

POTSDAMER
ALTERTUMSWISSENSCHAFTLICHE
BEITRÄGE (PAwB)

Herausgegeben von
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Band 15

Clifford Ando / Jörg Rüpke (Eds.)

Religion and Law in Classical and Christian Rome

assisted by Sarah Blake
and Mihaela Holban



Franz Steiner Verlag 2006

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Bibliografische Information der Deutschen Bibliothek
Die Deutsche Bibliothek verzeichnet diese Publikation
in der Deutschen Nationalbibliografie; detaillierte
bibliografische Daten sind im Internet über
<<http://dnb.ddb.de>> abrufbar.

ISBN-10: 3-515-08854-7
ISBN-13: 978-3-515-08854-1

Gesetzt von Diana Püschel am Seminar für Religionswissenschaft der Universität Erfurt unter Verwendung von TUSTEP.



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Gedruckt auf säurefreiem, alterungsbeständigem Papier.
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Druck: Printservice Decker & Bokor, München
Printed in Germany

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Introduction

Religion and law in classical and Christian Rome

The contributors to this volume were invited to reflect upon the relationship between religion and law in the Roman world, from varied perspectives, from the late Republic to the final codification of Roman law in Justinian's Constantinople.

Law is a particularly fruitful means by which to investigate the relationship between religion and state, for reasons both historical and theoretical. On the one hand, law is the mechanism by which the Roman state and its European successors have regulated religion, in the twin actions of constraining religious institutions to particular social spaces and of releasing control over such spaces to those orders. And on the other, classical Roman law and Roman Christianity form two of the bases through which relations between religion and the state have been forged, and those relations have been debated in politics and theory, down through the years.

We chose to embrace a period stretching from the late Republic to the late empire not simply because we wished explicitly to acknowledge that our knowledge of even classical Roman law often derives from sources written or compiled after the empire's conversion to Christianity. Rather, we wished also to confront the tendency among scholars of Roman law to bracket religion – to imagine the law as having divorced itself from religious authority in the archaic period, only to remarry an oriental bride in the age of anxiety – as well as the corresponding inclination of historians of civil law in Europe to forget the pagan classical roots of its notionally – Christian late-antique and medieval codifications. This collection aims likewise to complicate the study of religion at Rome, to break down a tendency to study its relations with the law along one or the other or both of two paths, namely by collecting and analyzing the evidence for formal state actions, or by aligning a reconstructed Roman <sacred law> with Mosaic codes of ritual and moral purity. There is more to this history than persecution and piety.

In this field as so often elsewhere, the seeking in Rome after origins, after paradigms and antecedents influential upon later ages, founders upon three interrelated conditions: first, our textual evidence generally reaches back no further than the second century before this era and often no further than the first – to a time, in other words, when Rome had long since become one of the largest and most complexly ordered societies in the world; second, that same evidence almost always reveals Rome in a state of flux, its intellectual life as dynamic, and hence reveals itself to be the product already of many centuries' evolution and not, therefore, of some simple transition from archaic to classical, or oral to literate, for example; and third, the Romans themselves naturalized the dynamism and instability of their world by advocating adherence to an enormous cultural conservatism.

As an illustration of these difficulties as they pertain to this project, consider the following distinction between public and private law, crafted by the jurist Domitius Ulpianus, whose political career reached its peak in the third decade of the third century of this era. Born at Tyre, Ulpian wrote the majority of his works in the aftermath of Caracalla's extension of Roman citizenship to all free residents of the empire.

Huius studii duae sunt positiones, publicum et privatum. publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim. publicum ius in sacris, in sacerdotibus, in magistratibus constituit. privatum ius tripartitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus.

There are two aspects to this subject, public and private. Public law is that which regards the condition of the Roman state; private, that which regards the well-being of individuals. For some matters are of public and others of private interest. Public law consists in *sacra*, priests, and magistrates. Private law has three parts: for it derives from natural precepts, from those of the nations, and those of the state.¹

Sacra are things belonging to, or actions performed for, the gods; and what was <public> pertained to the *populus*, the people, a community joined by consensual commitment to a particular normative order: a body of citizens.² Hence, at first glance Ulpian seems to presuppose that persons' civic and religious identities will overlap, indeed, that they will be coextensive. But even were such a brief reading useful, the import of such a presupposition would have been quite different in Rome of the early third century (or of the late Republic) than it will have been in the sixth century, when this definition of public law was excerpted from Ulpian's *Institutes* into Justinian's *Digest* and paraphrased in his *Institutes*, and it will have been different again in the fifteenth and sixteenth centuries, when it achieved a new currency in debates on law and religion in confessionalized Europe.

But our difficulties are more substantial than those raised by the mere elision of historical change by some frankly improbable lexical continuity. For it turns out that *ius publicum* was not a technical term within Roman law in the age of Cicero, that his was rather an era in which an enormous amount of ambitious theorizing regarding law and religion was being done; and Chapter 8 sketches some of the most important tenets of that project and inquires into its reception among high and late imperial lawyers and theologians. What is more, the Romans felt a profound reluctance to codify for themselves exactly those things that Ulpian denominated *ius publicum*, namely, the law that consisted in <*sacra*, priesthoods, and magistracies.> Indeed, our best evidence for Roman thought on this issue in the late Republic and early empire derives from municipal constitutions drafted at Rome for colonies and municipalities elsewhere; and while Chapter 2 takes up just this problem, it must be confessed that neither substantially-preserved charter retains the clauses that will have enumerated the priesthoods of its community.

For now, receiving our impetus from Ulpian, we might ask how the distinction within law between public and private held within religious life. Indeed, how did the Romans conceive religion itself, such that its public and private forms were so easily balkanized? And what space did a Roman law that embraced sacred things and priests as well as magistrates grant to individuals in which to practice their own cults, and how did it conceive of those whose actions it deemed unacceptable? Where religion itself is concerned, Chapter 3 explores the role of law in drawing a boundary between religion and one of its many others, namely, magic. This classificatory scheme, its language and the coercive apparatus that developed around it, had a long life in the high and late empire, and Chapters 6 and 7 explore some aspects of that history. For the present, let us turn to conceptions within Roman law of the public and private spheres and of the place of religion within them.

We should first observe that Romans distinguished what was public not simply from what was private, but also from what was foreign. That is to say, <the public> anchored two quite distinct polarities, but their individual logics turn out to have a great deal to say about

each other. For what was <public> as a matter of law were the things of the people, and a people was above all a community of citizens. So, for example, the second-century lexicographer Festus, who drew heavily on the work of the Augustan polymath Verrius Flaccus, described *publica sacra*, public rites, as <those performed at public expense on behalf of the people, on behalf of (the inhabitants) of mountains, villages, and consecrated meeting houses, and (groups centered around) sanctuaries.> Private rites, by contrast, were <those performed on behalf of individuals, families, and clans.>³ Peregrine, or alien rites, form a curious third category, consisting not of the set of all rites performed by all non-citizens, but rather of <those which were performed either for gods called forth to Rome from besieged cities, or for the sake of certain cults sought in peacetime.>⁴ No doubt the Romans had a way of describing rites performed by foreigners in foreign lands, whether by individuals for their own sake or for the sake of their communities. But this category clearly embraces only those rites performed publicly at Rome but which remained, for whatever reason, ideologically and legally alien. The extraordinary expansiveness of Rome's particular conception of *civitas* and *res publica*, and its liberal admission to citizenship, naturally resulted in a likewise striking conception of <Roman religion>: not the religion of the territory of the city, but of the city's citizens.⁵ But in the final analysis this conceptualization remained incoherent, as we shall see.

If we approach the <public> a second time, this time by way of the private, we encounter a similar structural difficulty, whereby <the public> is defined by opposition to some other, but the conceptualization of that other is purely circular. Consider the second law offered by Cicero in the draft constitution contained in his work *On the Laws*, which urges as follows:

Separatim nemo habessit deos, neve novos neve advenus, nisi publice adscitos. Privatim colunto quos rite a patribus <cultos acceperint.>

Let no one have gods separately, either new or foreign, unless they have been recognized publicly. Let them worship in private those whose worship has been duly handed down by their ancestors.⁶

Latent in these clauses are potential ruptures at several levels. First, Cicero does not explain the difference between <having a god separately (*separatim*)> and <having a god privately (*privatim*)>, but it is clear that he recognized the potential for individual (as opposed to private) action to affect state cult. It is precisely that possibility that he seeks to foreclose. At the same time, the public recognition of a deity might seem to hold out the possibility of obligating or affecting individuals in their private practices, and so raises the question how the commitment of individual citizens to civic cult was conceived. What is more, the city of Rome regularly acquired new citizens and resident aliens, and immigrants of either legal status tended to travel with their gods. What happened when that which was duly handed down was foreign or new?

To return for a moment to Festus' definition of <public rites,> we observe that he situates them in particular locations: <on behalf of mountains, villages, consecrated meeting houses, and sanctuaries.> His interest in place recalls the diction of Valerius Maximus, as imperfectly preserved by a later epitomator, in describing the expulsion of the Jews from Rome in 139 BCE. According to the text as we have it, the praetor Cornelius Hispanus expelled the Jews beyond the borders of the city and removed <their private altars from

1 Ulpian *Institutiones* bk. 1 fr. 1908 Lenel = *Dig.* 1.1.1.2 (trans. after D. N. MacCormick).

2 Cicero *Rep.* 1.39.1 and 3.45, together with Dyck 2004, 184–185 on *Leg.* 1.42.

3 Festus s. v. *publica sacra* (284L).

4 Festus s. v. *peregrina sacra* (268L); cf. Cancik and Rüpke 2003.

5 Cancik and Cancik-Lindemaier 1994.

6 Cicero *Leg.* 2.19: *Separatim nemo habessit deos, neve novos neve advenus, nisi publice adscitos. Privatim colunto quos rite a patribus <cultos acceperint.>*

public spaces.⁷ This care with regard to the legal-religious status of land accords closely with a judgment rendered by the pontifical college regarding the placement by private individuals of some tombs on land discovered later to have been consecrated to the goddess Honor. According to Cicero, who preserves the anecdote, 'the pontifical college decided that a public place could not be placed under the constraint of private religious observances,'⁸ and so the bodies were exhumed. At the same time, it merits attention that though all these texts stress the removal of private rites from public spaces, they devote no theoretical work to the understanding of privately-installed cults, and that inattention proves a further source of instability in Roman understandings of religion and law.

The distinction between public and private in the realm of religion thus integrates distinctions of several kinds, between spaces owned by the community and those owned by individuals; between the power of magistrates and that of private individuals; between gods formally summoned and received by magistrates, as opposed to those brought to Rome by individuals; and between cult acts undertaken for the good of the citizen body and those undertaken for the good of an individual or some collectivity other than 'the people.'⁹ This understanding of the boundaries of public and private should permit a more careful description of the forms and limitations of religious tolerance at Rome. For while tolerance may be preached by anyone, in complex states it is practised by governments; and though it exists as an abstract quality in modern theory, in practice its justifications and limitations are contingent and contextually specific. And so we suggest, whatever the roots of religious tolerance at Rome, tolerance itself was not the necessary product of its polytheism. Rather, tolerance extended to those private observances that did not infringe upon public cult – cult acts undertaken by magistrates, performed in public spaces, directed to the gods of the community, and expressive of a shared zeal for the common good.

The rough distinction we have drawn between public and private in Roman law and religion finds support in legislation after Cicero on the sacralization of space. Always at issue in that body of literature as it is preserved is the power of private individuals to sacralize or, more precisely, to tinge with religion a plot of land by burying a corpse in it, and the need to distinguish the religious effects of such action from the consecration of spaces undertaken by magistrates. In sum, private individuals can render their own property *religiosus*; magistrates render things *sacer*, sacred. In the words of the jurist Marcian, *sacrae res sunt hae, quae publice consecratae sunt, non privatae*; 'sacred things are those that have been consecrated publicly, not privately.' 'If a person privately makes something sacred for himself, it is not sacred, but profane.'¹⁰ Likewise, the taboo associated with the dead notwithstanding, individuals cannot render another person's property *religiosus* by burying a corpse on it; as they need the owner's permission for the burial, so that permission is a precondition for the religious scruple to adhere and the sacralization to take place.¹¹ What seems to clinch the argument is the logic of the judgment of Pomponius,

7 Valerius Maximus 1.3.3, in the epitome of Nepotianus: *Iudeos quoque, qui Romanis tradere sacra sua conati erant, idem Hispalus urbe exterminavit arasque privatas e publicis locis abiecit*. Compare Livy 25.1.6–12, describing events in Rome in 212 BCE. His report opens with the announcement that the longer the war went on, 'the more *religio*, and in large measure foreign *religio*, attacked the state', and he goes on to describe the failure of an initial attempt by the aediles to remove *sacrificuli*, petty sacrificers and their equipment from the forum. In the end, the Senate took action and forbade anyone from 'sacrificing according to a new or foreign rite in a public or consecrated space' (*neu quis in publico sacrove loco novo aut externo ritu sacrificaret*).

8 Leg. 2.58: *statuit enim collegium locum publicum non potuisse privata religione obligari*.

9 Recall in this context the language of Ulpian (reference in note 1): *publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem*.

10 Marcian *Institutiones* bk. 3 = Dig. 1.8.6.2–3. See also Ulpian *Ad edictum* bk. 68 = Dig. 1.8.9.

11 Dig. 1.8.6.4; Dig. 10.3.6.6; Dig. 11.7.2.1–2, 7–8.

followed by Paul, that *ex consensu tamen omnium, utilius est dicere religiosum posse fieri*, 'when everyone is in agreement, however, it is more conducive to well-being to say that a place can become *religiosus*.'¹² The passage may have been excerpted from a debate over the ability of individuals to sacralize land possessed by one party but owned by another, if the burial takes place without the permission of the owner. But the invocation of *consensus omnium* invites us to speculate about the extension of this debate to the possibility of rendering public land *religiosus*. The conclusion is that an individual cannot make it so, but the public can. Among its many accomplishments, Chapter 1 provides a framework within which to understand the development of this distinction within religious practice, as also its articulation through notions of public law.

Given the place of law in Roman social theory, and of jurisprudence in Roman education, it was inevitable that lawyers should become theologians, and that polemicists both within and between religious communities should have recourse to law. Chapters 3, 4 and 5 consider different moments in that history, examining in turn the use of legal argumentation in Christian polemics, legal social theory as a foundation for persecution under the Tetrarchy, and law as an index of cultural difference in the *Comparison of Mosaic and Roman law*.

But the most remarkable exploration of the conceptual apparatus explored here – and certainly the most extended exploitation of its language – comes to us not from a lawyer, of whatever religion, but from Augustine, and so we return to a central concern of this project, namely, the passage of classical language and social theory from the world of Roman law to that of Christian late antiquity. The text to which we refer is the answer to the seventy-ninth of Augustine's *Eighty-three different questions*, 'Why did the magicians of the Pharaoh perform some miracles, as Moses the servant of God did?'

Augustine responds, naturally enough, by distinguishing between the actions of Moses and the magi, in such a way that the miracles of the former can be categorized as good and those of the latter as deceitful. But the language and arguments he uses are not Biblical, nor even Christian, but Roman and legal.

Thus the holy servants of God, he wrote, are sometimes allowed 'to command the lowest powers, in order to perform certain visible miracles.' This happens in accordance with what is *utile*, what is conducive to well-being – a standard for assessing actions thoroughly implicated in classical law (see Chapter 8, page 139). What is more, the servants of God have that gift *secundum publicam et quodammodo imperialem legem, hoc est summi dei potestatem*, 'in accordance with public and, as it were, imperial law, which is the power of the highest god.'¹³

Magicians, on the other hand, do not actually command the lowest powers, as saints do. Rather, the powers themselves are granted the opportunity to deceive magicians and those who place their trust in them – but their ability to perform miracles exists *privato iure*, by private right.¹⁴ Augustine develops this metaphor at remarkable length:

When, therefore, magicians do such things as sometimes the saints do, their actions indeed appear to be the same, but they are done both for a different end and under a different law, *sed et diverso fine et diverso iure*. For magicians act seeking their own glory; but the saints seek the glory of God. Again, magicians act through certain things granted to the [lowest] powers in their domain, as if in some private contractual or social relationship, *quasi privata commercia vel beneficia*; but the saints act in public governance, *publica administratione*, at the command of him to whom all creation is subject ... Wherefore it is one thing for magicians to perform miracles, another for good

12 Dig. 11.7.3.

13 Augustine *De diversis quaestionibus* 79.1.

14 Augustine *De diversis quaestionibus* 79.1.

Christians, and still another for bad Christians to do so: magicians act through private contracts, *per privatos contractus*, good Christians through public justice, *per publicam iustitiam*, and bad Christians through the tokens of public justice, *per signa publicae iustitiae*.¹⁵

Where metaphor operates through analogical construal and so works within law to construct homologies, the seeming violence of this transposition, from the world of law to that of religion and back again, operates in pursuit of difference. For Augustine adopts the language of classical law, which once had served to marginalize and criminalize Christianity itself, in order to make a homomorphic distinction, in which, it might seem, only the roles have changed. Are we once again in the position described above, in which lexical continuities across the centuries prevent us from discovering in the language of law the means to distinguish the Christian empire and its concerns from pagan Rome?

Not quite. For the opening statement of Augustine's answer to the seventy-ninth question runs as follows:

Omnis anima partim privati cuiusdam sui potestatem gerit, partim universitatis legibus sicut publicis coercetur et regitur. Quia ergo unaquaeque res visibilis in hoc mundo habet potestatem angelicam sibi praepositam, sicut aliquot locis divina scriptura testatur, de ea re cui praeposita est aliter quasi privato iure agit, aliter tamquam publice agere cogitur.

Every soul wields a power that is its own, unto itself; at the same time, every soul is constrained and ruled by laws of the universe – as it were, public laws. Since, therefore, every single visible thing in this world has an angelic power placed in supervision of it, as numerous passages of divine scripture testify, regarding that thing over which it has supervision, the angelic acts sometimes *quasi privato iure*, as if by private or individual right; at other times, it is compelled to act in another way *tamquam publice*, as it were, in public.¹⁶

Augustine's use of classical language is thus self-consciously metaphorical, and the gap between his usage and Cicero's may be measured along at least two axes. For Augustine, at least – and he was a theologian, and not a legislator – the public is not a state that requires governance at all, and the private is located not in acts of cult or social actions per se, but in the soul. From the vantage point of Christian or post-Christian modernity, those conclusions might seem obvious; it is one of the aims of this collection to reveal their radicalism.

We are now far from the beginnings of this history, even insofar as they are accessible to us. But let us turn back one more time, to approach the nexus of law and religion from still another perspective. Early Roman penal law took the possibility of successful human employment of divine powers for granted, and acknowledged the possibility of transferring crops by enchanting them (see Chapters 3, p. 55, and 4). At the same time, lawmakers were at pains to avoid themselves interfering with the gods' prerogatives, and sanctioning state actions that did likewise. The quota for the election of priest – precluding, not replacing cooptation – therefore remained deliberately just below a numerical majority: only 17 out of 35 tribes were allowed to vote, while the selection of the tribes that would vote was left to the lot. Similarly, land could be consecrated to the gods, but depropriation required the god's assent. Terminus, as we know, was not willing to give it.

Republican law, then, erected boundaries around religion even as it recognized its centrality. Human institutions were recognized for what they were, and limits were established that respected the agency of the gods. Postclassical law, in contrast, tried to mobilize religion as a source of legitimation, for the ruler as for the lawgiver. But from this developed a new dynamic: if religion could support different, competing claims to power, then political differences could be projected onto competing religions. Power could be then

15 Augustine *De diversis quaestionibus* 79.4.

16 Augustine *De diversis quaestionibus* 79.1.

brought to bear, by marginalizing or criminalizing other religions. It was not the end of polytheism, but the novel construction of a plurality of politically exploitable and necessary religions that marked the end of classical tolerance.

In conclusion, we hope that this volume will provoke thought in at least two directions:

First, the incorporation of religion within the law intensified the governmentality of the ancient world. This was true in different ways at Rome and in the provinces of the empire. For the latter might have lain forever outside the consciousness of Roman priests, uninterested as they were in cults on provincial soil, had not the universalism of Roman law brought provincial religion within the scope of their concerns. In both arenas, this process required and produced a continual (re)definition of what lay within the competencies of the state. This embraced negotiations over the boundaries between public and private, sacred and secular, and human and divine. It is our hope that precise historical studies might denaturalize, without in any way dematerializing, the concepts and debates that were produced by, and attendant upon, this history.

Second, we come to know Roman law at a time when it had already been laicized, and what we witness in the classical period is the recursive inscription of religion both within the law and as a form of law. Viewing late Republican literature in this way permits us to see both the archaism and legalism of religious language in a different light; it also helps to historicize what one might call, with deliberate anachronism, the peculiar proto-establishmentarian tendencies of Roman constitutional law and, *mutatis mutandis*, the constitutionalism of Roman priesthoods and priestly practices. Moving across time, the history of religion and *ius publicum* appears not simply as a sequence of encounters between Roman law and different religions, but as the engagement of theorists and practitioners of government with different theories and metaphysics of the social.

The editors would like to thank Sarah Blake and Mihaela Holban for invaluable and expert assistance in the editing and preparation of this volume.

For support of the meeting in Los Angeles at which Elizebeth Digeser and John Scheid's papers were first delivered, Clifford Ando would like to thank the Center for Law, History and Culture at the University of Southern California. His subsequent work on the volume was supported by a Frederick Burkhardt Fellowship from the American Council of Learned Societies, and by the hospitality of the Huntington Library. He thanks both those organizations for their aid. The meeting at the University of Erfurt had benefitted by subsidies from the Deutsche Forschungsgemeinschaft.

Chapter 1

Oral tradition and written tradition in the formation of sacred law in Rome

by

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With a cultural background like ours, which relies essentially on the model of a revealed religious tradition, transmitted by a Book, it is difficult to understand the oral nature of Roman religious tradition. A second difference increases this first difficulty of understanding: the ritualistic character of Roman religion, which enhances its oral character. The consequence of these features is a certain contempt and neglect by modern scholarship of what actually formed the core of Roman religion: ritualism.

The controversy about ritual reaches back to Roman times. It started with Christian discussions about the rituals of the Jews and pagans.¹ Closer to us, the debate took radical forms during the Reformation and then acquired the main lines that still obtain today.² I do not want to go into particulars; here is sufficient to observe that this debate has affected the history of religion as well as theology. The history of ancient religions developed under the influence of both this debate and a negative prejudice against ritual.³ Since the 19th century at least, philosophers and historians have opposed interior spirituality to external practice, religion of the heart to religion of reason. According to them, ceremonial and regulation cannot be mistaken for natural religion and the spontaneous impulse of the soul towards the infinite. Or rather, this fundamental prejudice against ritual was transposed in history: according to this inclination of the occidental mind, the original impulse towards the divine was supposed to have been confiscated once by the priests, and reduced to a dry and dreary system of rituals. The original revelation then split, and its ruins covered the whole earth. Consequently it is the task of philosophers, theologians and historians to reconstruct the history of this degeneration, and of the dialectical process towards the reunification of heart and reason in the new religion. Despite all their differences, the scholars who adopted this approach agreed about the authors of the decay of religion, from India to Israel, from the first Christians to the papists: the guilt belonged to priests. And the main tool of this appropriation of piety, the vehicle of their delusive authority, were their books. All the power to the priests, all the power to their books.

1 See, e. g., Tertullian *De praescr. heret.* 40.

2 On the history of criticisms of ritual, see Smith 1990: 1–35, Bremmer 1998, and Ando 2003: 101–105.

3 See for this problem J. Scheid and F. Schmidt 1994: 1 ff.

1 The importance of ritual in Roman religion

This large romantic fresco depicting the religious evolution of mankind that I have sketched in a few words also had a strong influence on the study of Roman religion. It has conditioned the general appreciation of that religion, as of the role of written texts within it.

I neither need nor want to go into particulars about the misinterpretation of Roman ritualism.⁴ I just would stress the following points. The religion of the Romans was undoubtedly ritualistic. Nobody ever denied that. But one may take account of that fact in different ways. Most often, the acknowledgement of that characterization has been transformed into a judgement: this kind of religion, or this aspect of Roman religion has to be dismissed! For in historical times rituals, it is supposed, had become empty forms, deprived of all meaning. After the mythical priest-king Numa, we are told, rituals were managed by priests who resembled grocers and clerks rather than holy men. Nonetheless, those who made this judgement could not avoid the question of the meaning of these rituals, particularly the most bizarre ones. So they concluded that rituals ceased to have meaning at some later date and were merely vestiges of primordial practices that were supposed to have expressed relations with the divine in a naive way. Influenced by ethnology, other scholars, like Ludwig Deubner, followed by Georg Wissowa, even supposed that rituals were originally only magical techniques and gestures intended to avoid evil or to realize some advantage.⁵ These naive gestures preceded cult, which is supposed to have appeared eventually with the notion of superior beings. In any case, the ritualism of historical times itself deserves no interest. Sometimes, as with Theodor Mommsen or Georg Wissowa, ritualism was actually explored as an interesting formal system of rules and prohibitions, whose legal nature could throw additional light on legal traditions.⁶ But few scholars allowed even this kind of interest. Many people, for example, thought that Georg Wissowa's great book about Roman religion was a failure, because it dealt only with the dead form of ritual, and had no interest in what they called true religion and piety.

Today one can study and think about ritual in a different way. Rituals are indeed a system of rules and prohibitions. But being that, they are not inevitably dead vestiges of naive practices. Engagement with anthropology shows that ritual systems can be living systems, whose interest lies in the present, and not in the past, even if there can be an evolution. Precise and unprejudiced inquiry has shown during the last twenty years or so that ritual rules were the only official and essential element in Roman religion. The sole commandment of Roman piety was to observe its rules and prohibitions. From this point of view, rituals did not need to be understood, because their necessity was their only certainty. So in studying the formal system and the combination of the rules, Georg Wissowa was closer to the core of «true» Roman religion than, for example, Ulrich von Wilamowitz ever was to the core of Greek religion.

2 The modern myth of the *Priesterbücher*

When, according to the romantic theory about the origin of ritual, natural ways of communication with the divine became incomprehensible to one or more parts of the

4 Durand and Scheid 1994.

5 Deubner 1911; see the critique of K. Vahlert, 1935; Wissowa 1912: 409, 417.

6 Wissowa 1912: VIII.

human community for various reasons such as, for example, the increasing mixing of peoples, customs had to be memorized. They were objectified and turned into rituals, into cult and tradition. Finally, cult could only be celebrated by traditional rituals. At its origins, ritual was merely an external aspect of veneration, and it was only done for its religious significance. Later, this referential function disappeared and ritual was executed for itself: it became the only content of religion. Such, in literal translation, is the reconstruction of the evolution of religion presented by Georg Rohde, who wrote a very fine book on the Roman *Priesterbücher*.⁷

According to this scenario, sacred writing was linked to the birth of ritual; it served to collect, to control and to petrify the natural customs of communication with the divine. Since Barthold Georg Niebuhr, it has been known that the archives of the priests contained very old books that reached back as far as King Numa.⁸ These books were said to have set forth general rules of all the cults. Theory here seems to meet with evidence, since Roman myth says that Numa initiated ritualism. So, since the beginning, oral tradition is supposed to have relied on written documents. Sacred law, in other words, existed from the beginning.

This theory became very popular. It even served as a starting point for an ambitious project, partly realized by German scholars.⁹ In reaction to Niebuhr's careful statement, Julius Ambrosch decided in 1840 to start a collection of all the fragments of these sacred books belonging to the Roman priests.¹⁰ He declared that there were two *monumenta principalia*, one dealing with theology and the other with ritual. The first one was supposed to give the names of all the gods venerated in Rome, the other one the *ius caerimoniarum*, the rules of divine service. Following only the rhetorical scheme of the Varronian *Antiquitates humanae* or *diuinae*, Ambrosch decided that the liturgical books were divided in four sections, dealing with the places, the times, the rituals and the celebrants of cult: *ubi, quando, quod* and *qui*? As there existed at least fifteen priestly colleges in Rome, Ambrosch concluded that there were at least sixty ritual books dedicated, or even more, since he conjectured that one copy of each was transmitted to the pontiffs. Ambrosch himself started by exploring the remains of the first sacred book, the pontifical collection of *indigitamenta*, 'the invoked gods and goddesses.' Following his main sources, the antiquarians Varro (first century BCE) and Servius (fourth/fifth CE), he concluded that the books gave the names of each god, sometimes with an explanation of that name. Ambrosch died before he could go further, but his project was continued a generation later by August Reifferscheid's pupils. One of them, Rudolf Peter, for example, followed Ambrosch's convictions and collected the fragments of the pontifical book about public priests.¹¹

Despite being very useful as a collection of evidence about Roman priests, the specific project is wrong-headed because there is no positive evidence that these fragments go back to so-called sacred books. Reifferscheid and his other pupils, Paul Preibisch and Paul Regell, who wrote their dissertations on the *libri pontificales* and *augurales*, warned against Ambrosch's optimism.¹² They showed that Ambrosch's quotations were mostly not of sacerdotal origin, and that the scanty direct evidence from priestly books proved these to be collections of various kinds of records (the *commentarii*). This criticism, backed up by the French André Bouché-Leclercq,¹³ did not restrain Wilhelm Rowoldt in 1906 from

7 Rohde 1936: 115 ff.

8 Niebuhr 1846: 10 f.

9 See for this theory Scheid 1994; Scheid 1998.

10 Ambrosch 1840; Ambrosch 1843.

11 Peter 1886.

12 Preibisch 1874; Regell 1878.

13 Bouché-Leclercq 1904; Bouché-Leclercq 1871: 21 f.

collecting the fragments of the so-called pontifical book on sacrifice.¹⁴ And he was not the last one to draw on this fantasy. As late as 1967, Giovanni Battista Pighi, a fine expert on the (genuine) *commentarii* of the Secular games, put up a general plan of the sacerdotal books that would have delighted Julius Ambrosch.¹⁵ Pighi distinguishes eleven categories of books, those of the colleges and *sodalitates* of public priests, and those of the *ordo haruspicum*. I shall limit my description to Pighi's pontifical archive. According to G. B. Pighi, it was divided into two sections, the second having three sub-sections. The first section is supposed to have contained the lists of members, the proceedings, the decrees and the jurisprudence of the college. There was an appendix with the public calendar, the lists of consuls and of triumphators, and the famous *Annales*, a sort of list with the major events in the running year. The second section is supposed to have dealt with the *ius diuinum*. A first sub-section gave the priestly books, which means all evidence about the ten colleges and the *sodalitates*: the rank of the priests, questions of vocabulary, such as the definition of *sacer*, *sanctus*, *religiosus*, and a classification of all rituals (*sacra*). Sub-section two dealt with the so-called royal laws, i. e., the documents about the *spolia opima*, the dedication and what Pighi calls *antiquae orationes*. Finally, sub-section three had the records, the prayers and the *indigitamenta*. I shall stop here. Such nonsense makes us laugh, but is it definitively banished? Even Georg Rohde, who devoted himself to continuing Reifferscheid's demonstration, and who proved that the so-called *libri sacerdotales*, *pontificales*, and so on, of our sources were mainly treatises written by antiquarians about religion, and not direct evidence drawn from sacred books, could not restrain himself from falling back into Ambrosch's fantasy. Rohde's general theory of the birth of the sacred books runs as follows.¹⁶ At the beginning of the petrification of ritual, the books were used to fix the cultic rules into memory. This was done in a very laconic way at first, because everybody still knew the features of the cult. But as societies grew more and more complex, the books also became more complex. Accordingly, Rohde distinguishes two categories of books: one, which he calls *commentarii*, contained general rules of cult and religion, and the other contained provisions for specific cults, or in other words, the *decreta* and *responsa* of the priests. So Georg Rohde finally returns to Ambrosch and his theoretical framework. In a very accurate way he first criticizes the evidence, and disqualifies most of it as 'sacred writing', and yet, he nonetheless makes the same statements as his predecessors about 'sacred books.' In fact, Rohde was more interested in criticizing the collections of fragments made by his predecessors than in the notion of sacred book itself. Such is also the result of the recent inquiry of Francesco Sini.¹⁷ After a clear and critical description of the theories about the books of the priests, Sini does not succeed in avoiding the myth of the original *Ritualtext*, the *Urbuch*, where the general frame of the cult, and – who knows? – its justification were put down.

3 Oral tradition and written texts in Roman religion

As there is no evidence at all about these books, one has to accept the fact that Roman religious tradition was mainly oral. Further, all scholars agree that this tradition concerned only rituals. But, if there did not exist some sort of *Ritualtext*, collecting and exposing the

14 Rowoldt 1906.

15 Pighi 1967: 41–53.

16 Rohde 1936: 115 f.

17 Sini 1983.

main outlines of ritual rules, what exactly was this oral tradition? And how was religious knowledge transmitted? How did sacred law, which was a category of public law, develop?

I suggest that religious tradition in Rome was twofold. It consisted on the one hand in the ritual calendar, and in precise instructions for the offices on the other. The liturgical calendar, orally instituted on the *nonae* of every month by a priest (the *rex sacrorum*)¹⁸ and by additional proclamations for sacrifices or festivals without fixed date, prescribed the religious duties of the State; private obligations were probably announced in families or other private groups in the same way.¹⁹ Instructions for the religious services to be celebrated on these days were transmitted from generation to generation as ritual knowledge, which belonged mainly to assistants and public slaves who were actually charged with most of the ritual gestures such as killing and dividing the sacrificial victim; besides, for the recitation of specific prayers and hymns, the celebrants had books, called *libelli*, booklets. The oldest written documents of Roman religion are prayers or hymns of this kind, whether public or private: the *carmen saliare*, the *carmen aruale*, and perhaps the inscription of the Duenos pot.²⁰ The ritual instructions Cato the Elder gives his farmer are mainly prayers and sketchy provisions about the kind of offerings needed. The fact that prayers were written, and often dictated to the celebrant by a priest or an assistant, sometimes *ex scripto* (from a written formula), is due to the fact that in Roman religion they were performative: gestures could be repeated, but prayers immediately realized what had been said, and that could be very dangerous. During cult, the prayerbooks (*libelli*), and the *codices* (tables) on which the priests registered a report of their decisions and celebrations are the only written documents we hear of.

There was no religious teaching other than practice and assistance to the divine services. By the day of his majority, every young male had to be capable of sacrificing or performing a consultation of the gods. He learned these procedures, like all the other features of social life, during the preceding years at the side of his father or of a friend of his family. Like the prayer texts Cato writes down for his *vilicus*, the formulas of public cult, those of dedication (transfer of public possession) or of vowing (the settling of conditional contracts with gods) were kept and delivered to the officiating consul or praetor by the *pontifices*, which brings us back to written tradition.

In addition to this ritual savoir-faire and the *libelli* with the cultic formulas, Roman tradition included a second element: religious jurisprudence. When a problem arose concerning the application of a ritual rule, about the material components of a ceremony, or when a public decision affected religious obligations, the authorities of the Roman state consulted the priests. For cultic purposes they addressed the pontiffs, for divinatory affairs the augurs, as well as the (quin)decemviri, who kept the Sibylline books.²¹ The priests were consulted by the consuls or the praetors, who were in charge of most public cult, and by the Roman senate, whose duty was to give advice to the magistrates, in particular about

18 The 5th or the 7th of the month.

19 Cato's prescriptions to his farmer, in the *De agricultura*, give also a small religious calendar; the calendar of the XXth cohort of the Palmyrenians discovered at Dura Europos (third-century CE) gives an example for the specific calendar of the Roman army. Very often also foundations or constitution of private colleges give a short calendar.

20 For the *carmen saliare* cf. Pighi 1958, and the *carmen aruale*, J. Scheid 1990: 617 ff., 644 ff. (literature). For the Duenos-inscription, cf. Magdelain 1990, with literature. The so-called inscription of the *lapis niger* is a *lex sacra*.

21 The Sibylline books transmitted in a certain sense religious tradition. But actually these secret verses were only used for public divination. Furthermore, the oracle handed over to the senate was an acrostic written by the priests and formed with the letters of one or two verses extracted from the Books. So divine revelation was written by the priests themselves. See Scheid 1998.

religious questions. The answers of the priest were registered not only in their own annual proceedings (the so-called *commentarii*), but also in the reports of the senatorial debates; in particular, they appeared slightly transformed in the *senatus consulta* or in the edicts of the magistrates enacting the decisions about the adaptation of religious rules. This shows that Roman priests did not form a separate power. Before giving advice, they needed to be consulted, and their advice could only be enacted by the authority of a magistrate. But in any case, this second source of religious tradition, consisting in reflections upon and small adjustments to oral tradition, was written down. These decisions were published in a written form – a *decretum* of the priests, a *senatus consultum*, or an edict of a magistrate – and consequently kept in a public archive.²²

So one can consider that Roman religious tradition consisted in the combination of two elements: on the one hand, a ritual savoir-faire, orally transmitted from father to son, from public officer to public officer, relying on written formulas of prayer and an orally-enacted calendar; on the other, isolated decisions adapting these ritual rules to new situations.

4 The *commentarii* of the Roman priests

As a result, the written public tradition about cult was not exhaustive, even in a schematic way, nor was it easily accessible. The sacerdotal archives were restricted to the priests, and those who wanted to reconstruct religious jurisprudence needed to do long and complicated research in the archive of the senate. All this written tradition (if it survived at all) was not accessible in a comprehensive and systematic code. Just as there was no revelation about the ultimate reason of things, there was no comprehensive sacred law presented in a book.

Now the category of *ius sacrum* did exist: it was part of *ius publicum*. André Magdelain describes it as a collection of public prayer formulas with short instructions for how to use them.²³ These central elements were progressively mixed with some precepts and instructions about how to celebrate cult, which were given to the magistrates in the form of the official priestly advice to which I have just referred.²⁴ But nothing of this was ever laid down and fixed in separate sacred books. The priests indeed kept their *commentarii*, where they registered from day to day the decisions made as well as the services celebrated by them.²⁵ But even bracketing their inaccessibility to the profane, these cannot be considered a sacred book. One has the impression that, besides the prayer formulas, the *ius sacrum* – as a set of instructions about how to celebrate cult – was a virtual code. It gained an ephemeral existence only during the formal debates among priests, or in their discussions with the senate or a magistrate: it was always partly and orally reconstructed with reference to a precise problem during these discussions.

So Roman religious tradition has to be understood as a tradition orally expressed in very precise circumstances: during religious celebrations and during public debate about ritual problems. This tradition was transmitted only very partially by written documents, buried in rather inaccessible archives, and never collected and systematized into a corpus.

This may seem surprising, because Rome is supposed to be the civilization of legal codification. But one has to consider that codification touched only civil law: public law

22 For the magistrates also in private archives.

23 Magdelain 1995: 73–74.

24 Magdelain 1995: 75: «recettes et préceptes qui régissent les cérémonies du culte».

25 For the *commentarii fratrum arvalium*, the only surviving document of this kind with the *commentarium* of the Secular games, cf. Scheid, 1998a: III ff.

and sacred law never were codified in Rome, except in a very limited way in relation with civil law.²⁶ But the *ius civile* itself, i. e., the written tradition on civil law, helps us to understand some peculiar aspects of written religious tradition. According to André Magdelain, the *ius civile* only concerned the situations in which a simple citizen could borrow the eminent language of the law, usually restricted to the magistrate, and sometimes to the public priest. These situations were limited to the *legis actio* and to legal acts, but the language the citizens used in these circumstances had a special dignity that made the words spoken irrevocable.²⁷ The famous Laws of the Twelve Tables legitimated these performative formulas of legal action, and put their use beyond any contestation.²⁸

As I have said, Roman public law, like sacred law, never was systematized. Indeed, sacred law was subject to even less codification than was public law, because, by the time collections of statutes and imperial decisions were eventually made, the nature of sacred law had changed entirely and the old rules of Roman religion no longer needed to be collected and systematized. For us this loss is regrettable, because after the civil law had been published in the form of the Twelve Tables around 450 BCE, many written documents and books were published about civil law. At the end of the fourth century BCE, Cnaeus Flavius published the so-called formulas in law; the first *commentarii* of legal terminology also appeared at the end of the fourth century BCE; and finally in the second century BCE, Marcus Mucius Scaevola (the *pontifex maximus*) founded the discursive interpretation of the formulas and extracted from them *regulae*, rules, i. e., abstract principles.²⁹ André Magdelain has stressed that the written text of these *commentarii* drew its efficacy from the oral text of the formula; it was only during the second century that the rules were systematized. So what on extant evidence are lost to us, are all the interpretations of the formulas of sacred law and a formulation of the abstract principles of religious tradition which could have been produced by persons in authority.

5 The pontifical *regulae*

Magdelain's research on the constitution of civil law is essential for understanding both the importance of oral tradition, and also the transformations that occurred with the introduction of writing into the procedures of civil law. Even if sacred law never underwent these transformations, the constitution of civil law and of its interpretations helps us to imagine the procedures of Roman priests when giving advice.

Let us consider two kinds of examples, one illustrating the position of religious authorities within decision-making procedures involving magistrates and state religion, the other regarding the kinds of elaboration legal experts performed when treating matters of religious law. First, there is the case of the *ver sacrum* (the 'sacred spring') vowed by the Roman state in 217 BCE to the gods.³⁰ The Roman authorities promised all animals born during the next spring to the gods if the Roman people were victorious. The project itself of a *ver sacrum* had been suggested to the senate by a consultation of the *libri Sibyllini*; the decision was made by the senate and the dictator Fabius Maximus, who elaborated the formula of this *votum*, which constituted an innovation in Rome. What was the role of the

pontifices in this process? First, the pontiffs were asked for their advice only after the decision had been made. So they neither decided on, nor delivered the traditional formula of the *votum*. Nor did the decemviri, who consulted the Sibylline books and produced the oracle, write the formula of the *votum*: this task belonged to the senate and the dictator. Indeed, the *pontifices* only commented on the *votum*'s formula, stressing a neglected aspect of the text (i. e., the magistrates could not involve the patrimony of private citizens in a votive contract of the State). So their activity was limited to the formula itself, as was the role of the jurists in the interpretation of civil law during Republican times.

Examples of the second kind show the working-out of this role in relations between civil and religious law, on the one hand, and regarding the situation of private citizens under religious law, on the other. In his *Commentarii iuris civilis*, Cato the Elder alludes to the *mundus* and the intercalated month, in other words, to the calendar of the state and hence to matters that could provoke reflection on the implication of religious knowledge in *ius publicum* and in the conduct of the state.³¹ But in fact, Cato restricts himself to matters that relate to civil law, and the date of legal actions. As an expert on civil law, shying away from pronouncements on public law, Cato's reticence corresponds very precisely to that of the *pontifices* in the debates over, and performance of, the *ver sacrum*.

One generation later, Q. Mucius Scaevola was consulted about impiety, in a case likewise implicated in problems of legal terminology; and in this instance Scaevola responded as he did when consulted about civil law: he gave a sort of *regula*. The case considered whether a distinction should be drawn between a Roman praetor who would intentionally violate the interdiction to do official business on days consecrated to the gods (the *dies nefasti*), and the one who would do it unintentionally: (The praetor who has rendered judgment on such a day is freed of sin by the sacrifice of an expiatory victim, so long as he acted unintentionally; but if he acted intentionally, Quintus Mucius said that he could not be freed, being impious).³²

31 Cato fr. 1–2 (Huschke, Seckel and Kübler (eds.), *Iurisprudentiae anteiustinianae reliquiae* [Leipzig: Teubner, 1908]) = fr. 398 and 558 Schönberger.

32 Varro *Ling.* 6.30: *Praetor qui tum (i. e. die fasto) fatuus est, si imprudens fecit, piaculari hostia facta piatur; si prudens dixit, Q. Mucius aiebat eum expiari ut impium non posse* (the praetor who has made a legal decision at such a time, is freed of his sin by the sacrifice of an atonement victim, if he did it unintentionally; but if he made the pronouncement with a realization of what he was doing, Quintus Mucius said that he could not in any way atone for his sin, as one who was impious (trans. by Kent: had failed in his duty to god and country)); Macrobius *Sat.* 1.16.9–10: 9. *Adfirmabant autem sacerdotes pollui ferias, si indictis conceptisque opus aliquod fieret. Praeterea regem sacrorum flaminesque non licebat uidere feriis opus fieri, et ideo per praeconem denuntiabant, ne quid tale ageretur: et praecepti neglegens multabatur.* 10. *Praeter multam uero adfirmabatur eum, qui talibus diebus (i. e. festis) imprudens aliquid egisset, porco piaculum dare debere. prudentem expiare non posse Scaeuola pontifex adseuerabat, sed Umbro negat eum pollui, qui opus uel ad deos pertinens sacrorumue causa fecisset uel aliquid ad urgentem uitae utilitatem respiciens actitasset.* 11. *Scaeuola denique consultus, quid feriis agi liceret, respondit: quod praetermissum noceret.* (the priests used to maintain that a rest day was desecrated if, after it had been duly promulgated and proclaimed, any work was done on it. Furthermore the rex sacrorum and the flamines might not see work in progress on a rest day, and for this reason they would give public warning by a herald that nothing of the sort should be done. Neglect of the command was punished by a fine, 10. and it was said the one who had inadvertently done any work on such days had in addition to the fine to make atonement by the sacrifice of a pig. For work done intentionally no atonement could be made, according to the pontiff Scaevola; but Umbro says that to have done work that concerns the gods or is connected with a religious ceremony, or any other work of urgent and vital importance does not defile the doer. 11. Scaevola, in fact, when asked what might be done on a rest day replied that anything might be done which it would be harmful to have left undone.).

26 Magdelain 1995: 102.

27 Magdelain 1995: 96. The same is valid for a prayer or a vow.

28 Magdelain 1995: 101.

29 Magdelain 1995: 184.

30 Livy 21.63.1; 21.63.7; 22.9.7 ff.; Plutarch *Fab.* 4.4.

6 Regulations about impiety

Before going further, we should look harder at Scaevola's *regula*, which Cicero repeats in his *Laws*.³³ With some supplements, the same distinction is given by cult regulations from Spoleto, Luceria, Furfo, and the rules about tombs. These rules are known from inscriptions dating from the two last centuries of the Republic, from, say, 300 to the beginning of the common era; the tomb-regulations also survive from a later period. Though very attenuated, this evidence provides examples of the discussions and *regulae* progressively elaborated by the pontifices, such as could have formed a sacred law.

In order to show how these debates have been misjudged by modern historians, we must recall that, together with other casuistical features, this differentiation between a violation that can be expiated and an inexpiable violation has been invoked as proof of the decadence of Roman religion. Theodor Mommsen, Georg Wissowa, and even S. P. C. Tromp, who wrote a fine thesis on Roman expiation in 1925, in which he corrected other exaggerations of this kind, thought that the traditional sternness of Roman religion somehow softened during those years.³⁴ This aggravingamento was supposed to be another sign of the decadence of Roman piety. Tromp writes: 'In this way the Roman religion soon lost its vital strength. It is clear what mischief this alteration did to the Roman people'.³⁵

There is more. One must add to these so-called signs of decadence the contradiction between the ancestral glorification of *fides*, of good faith, and the emperor Tiberius' statement about perjury as related by Tacitus, in a case where, inter alia, the name of his deified father had been taken in vain: 'As for the perjury, it was on the same footing as if the defendant had taken the name of Jupiter in vain: the gods must look to their own wrongs'.³⁶ The apparent lack of concern on the part of the *pontifex maximus* Tiberius harmonizes with other statements on perjury found in Cicero, and, centuries later, in the *Codex Iustinianus*, which quotes a statement on the topic made by the emperor Severus Alexander in 223 CE.³⁷ If one supposes that perjury deeply offended Jupiter, the Penates, the Genius of the Emperor, the Divine Augustus, and other gods traditionally appointed as witnesses of an oath, one might conclude that that Romans of this age no longer showed

33 Cicero *Leg. 2.9.22*: *Sacrum commissum, quod neque expiari poterit, impie commissum esto; quod expiari poterit, publici sacerdotes expianto. (...) periurii poena diuina exitium, humana dedecus (...) impius ne audeto placare donis iram deorum* ('Sacrilege which cannot be expiated shall be held to be impiously committed; that which can be expiated shall be atoned for by the public priests. (...) For the perjurer the punishment from the gods is destruction; the human punishment shall be disgrace').

34 Mommsen 1907, 3: 126 f. (= *Strafrecht*: 811 f.); Wissowa 1912: 392 f.; Tromp 1921.

35 Tromp 1921: 151: *Sic religio Romana paulatim evanescens vim vitalem amisit. Quanto detrimento haec depravatio fuerit populo Romano in promptu est.*

36 Tacitus *Ann.*, 1, 732-4: *Rubrio crimini dabatur uiolatum periurio numen Augusti. quae ubi Tiberio notuere, scripsit consulibus non ideo decretum patri suo caelum, ut in perniciem ciuium is honor uerteretur (...) ius iurandum perinde aestimandum quam si Iouem fefellisset: deorum iniurias dis curae* ('to Rubrius the crime imputed was violation of the divine power of Augustus by perjury. When the facts came to the knowledge of Tiberius, he wrote to the consuls that a place in heaven had not been decreed to his father in order that he might be turned to the destruction of his countrymen. (...) As of the perjury, it was on the same footing as if the defendant had taken the name of Jupiter in vain: the gods must look to their own wrongs').

37 Cicero *Leg. 2.9.22*; *Cod. Iust.* 4.1.2 (rescript of Severus Alexander): *Iusiurandi contempta religio satis deum ultorem habet. Periculum autem corporis uel maiestatis crimen secundum constituta diuorum parentum meorum, etsi per principis uenerationem quodam calore fuerat periuratum, inferri non placet* ('the god's vengeance is enough for whom holds in contempt the respect of the oath').

any interest in their gods. In that light, it is also important to note that the *regula* established or, rather, repeated by the *pontifex maximus* Tiberius lasted at least for two centuries.

The situation, however, is far more complex. Before drawing general conclusions 'that are determined by our own commitment to a Christian representation of god and religion, one should first try to analyze very carefully the casuistical evidence, as I will briefly do now. I will try to explain the rules quoted in their Roman context, before proposing a few hypotheses of my own about the evolution of Roman religion and theology, as attested by this casuistry. In doing this, I will also describe the traditional representation of sin and guilt in Roman religion, a central point in Roman sacred law but one which was never discursively formulated or elaborated in a longer text.

Modern discussion regarding the distinctions drawn, for example by the jurist and *pontifex maximus* Q. Mucius Scaevola, between intentional and unintentional offences against the gods, and between deliberate offences with or without malicious intent (*dolo malo*), has focused mainly on the substitution during the second and first centuries BCE of a *mildere Praxis* for the supposed severity of an earlier age. Not included in the debate are offences required by cultic necessity, such as are attested in some of the rules of a grove near to Spoleto, in the *response*, of the jurists Umbro and Scaevola, by two pontifical decrees of imperial time,³⁸ and indirectly, by the proceedings of the Arval Brethren, who offer expiatory sacrifices before entering the grove of Dea Dia, in order to celebrate the cult service or to do maintenance work.³⁹ All of these activities were assimilated to unintentional offences.

Modern inquiry has therefore concentrated on five documents: the regulations of the groves in Spoleto and Luceria, the regulations of the Jupiter temple in Furfo, all located in Central or South Italy, a passage of the constitution of the Colonia Genetiva Iulia in Southern Spain, and finally the passage in Macrobius that has already been mentioned. The discussion concerns the following points:⁴⁰

1) Spoleto (Panciera 1994, 28ff)

Honce loucom nequ(i)s uiolotod neque exuehito, neque exferito quod louci siet, neque cedito nesei quo die es deina anua fiet; eod die quod rei dinai cau[s]a [f]iat, sine dolo cedre [l]icetod, sei quis uiolasit Ioue bouid piaculum datod, si quis scies uiolasit dolo malo, Ioue bouid piaculum datod et a(sses) CCC moltae suntod; eius piaculi moltaique dicato/[ei] exactio est[od].

'Nobody shall violate this grove, export or take away what belongs to the grove. Nobody shall cut (wood) except for the requirements of the annual divine service; on that day it shall be allowed to cut without malice for the requirements of divine service. If someone violates (this rule), he shall offer a *piaculum* of an ox to Jupiter; if someone violates (it) intentionally with malice, an expiatory sacrifice of an ox shall be offered to Jupiter, and three hundred asses shall be perceived as a fine. The offering of the *piaculum* and the collection of the fine shall be the responsibility of the dictator.'

2) Luceria

In hoc loucarid stircus | ne [qu]is fundatid, neue cadauer proiecitad neue parentatid. sei quis aruorsu hac faxit, [in] ium quis uolet pro iudicatod n(ummu) I manum inect[i]o estod. Seiue mac[i]steratus uolet multare, | moltare [li]cetod.

38 CIL 11.8259; cf. VI, 1884.

39 See Scheid 1990: 551-570.

40 Mommsen 1907: III, 126-127 = *Strafrecht*: 811-812.

«Nobody shall put dung, abandon a corpse or celebrate a funeral service in this grove. If someone violates this (rule), whoever wants shall put hand on him as if he had been condemned, and he shall set a fine of fifty sestertii. If the magistrate wants to impose a fine, he can do it.»

3) *Furfo* (ILLRP 508, 11. 14–16)

– *sei qui heic sacrum surupuerit, aedilis multatio esto quanto uolet. Idque ueicus mi(nor) par Fifeltares sei apsoluere uolent siue condemnare liceto.*

«If someone steals something sacred in this place; there shall be a fine set by the aedile. This fine can be matter of an absolution or a condemnation by the *vicus Furfensis*, that is the majority of the Fifeltares.»

4) *Lex coloniae Genetiuae Iuliae* (RS no. 25), chapter 73

Ne quis infra fines oppidi coloniaeue, qua aratro circumductum erit, hominem mortuom inferto neue ibi humato neue urito neue hominis mortui monumentum aedificato. si quis aduersus ea fecerit, is c(olonis) c(oloniae) Genetiuae Iul(iae) (sestertium) (quinque milia) d(are) d(amnas) esto, eiusque pecuniae cui uolet petitio persecutio t(exactio)q(ue) t(esto). itque quot inaedificatum erit Iluir aedil(is)ue dimoliendum curanto. si aduersus ea mortuus inlatus positusue erit, expianto uti oportebit.

«No one is to bring a dead person within the boundaries of a town or a colony, where (a line) shall have been drawn around it by a plough, nor is he to bury him there or burn him or build the tomb of a dead person. If anyone shall have acted contrary to these rules, he is to be condemned to pay 5,000 sesterces to the colonists of the Colonia Genetiva; and there is to be suit and claim for that sum by whoever shall wish (? according to this statute?). And whatever shall have been built, a duumvir or aedile is to see to its being demolished. If a dead person shall have been brought in or deposited contrary to these rules, they are to make expiation as shall be appropriate.»

5) *Macrobius Saturnalia* 1.16.10

– *praeter multam uero adfirmabatur eum, qui talibus diebus (i. e., festis) imprudens aliquid egisset, porco piaculum dare debere*

«Neglect of the command was punished by a fine, and it was said that the one who had inadvertently done any work on such days had in addition to the fine to make atonement by the sacrifice of a pig.»

All of these documents repeat the same rule, albeit in different formulations. On the one hand, they state that the guilty person can expiate an unintentional offence by offering a sacrifice.⁴¹ He might also pay a fine, a *multa*, for having disobeyed the regulation, or as given by the herald (*praeco*).⁴² On the other hand, the texts of Varro, Macrobius, and Cicero clearly state that if someone with malicious intent violates a sacred place, a holy day or a tomb, he remains forever inexpiable.⁴³ This fact is corroborated by a collection of famous scandals reported by the Roman historians.⁴⁴ This second part of the rule, relating to inexpiable sin, is sometimes formulated in an elliptic or ambiguous way, and as a result, discussion among historians focuses mainly on the interpretation of this ambiguity.

Let us start with the clearest document, the *lex sacra* of Spoleto. Mommsen and Wissowa have interpreted the regulation relating to intentional violation as follows: the guilty person now offers a *piaculum* and pays a fine, and with this, his case is closed. Thus, *eine mildere Praxis* instead of archaic, inexpiable guilt. But this interpretation misses the point. As suggested by Tromp, one must understand first, that the sinner has to pay a fine because he has violated a public regulation and, second, that the *piaculum* is not offered by

him, but by the priests of Spoleto or by the *dicator* mentioned, according to a certain number of examples. That was, for example, the rule reported by Macrobius about the violation of the regulation relating to the *flamines*. In 204 BCE, the violation of Hera Lacinia's grove by Pleminius was resolved in the same way by the Romans and the Crotoniates: the Romans immediately replaced the stolen goods and offered a *piaculum*. Pleminius was arrested, and sent to Rome to be tried. We don't know for what crime he was to be tried, because Pleminius died in prison under obscure circumstances. In any case, he is never described as asking pardon of the gods or offering an expiatory sacrifice.⁴⁵ Finally, there is a grammatical fact. Mommsen and Wissowa have interpreted the formula *Iouei bouid piaculum datod* in the inscription from Spoleto as an active sentence, but it is not necessary to do so: the imperative future can also have passive force (cf., for example, *liceto* in the texts from Furfo and Luceria). So the sacrifice of an ox to Jupiter is offered, and nothing requires that it be offered by the *impius*.

The constitution of the Colonia Genetiva only addresses the violation of the *lex*, and offers no indications about a religious penalty or the status of the *impius*. In Furfo, the *impius* – the *lex* does not specify as to intentionality – has to pay a fine if he violates the prohibition of theft in groves if the Fifeltares, likely the local authority, decide so. The *lex* of the Colonia Genetiva orders that the local authorities, the *duumviri* or the *aedilis*, and not the guilty person, demolish a tomb illegally built within the boundaries of the city. The succeeding rule is again ambiguous, and apparently bears out Wissowa's interpretation: «And whatever shall have been built, a *duumvir* or *aedilis* is to see to its being demolished. If a dead person shall have been brought in or deposited contrary to these rules, they are to make expiation as shall be appropriate». Now who is concerned with this expiation, which is necessary if a dead person has already been buried within the limits of the city, and who is supposed to offer the *piaculum*? Wissowa seems to believe that it is the *impius*, the one who has built the tomb and buried someone in it.⁴⁶ But in that case, he could only be an *imprudens*, an unintentional *impius*, because the *impius prudens* cannot himself expiate his crime. Since the text of the constitution is elliptic, we have to base the argument on tradition. But in any case, the debate is absurd because the expiation relates to another offence. Indeed, to bury someone within the boundaries of the city is not properly speaking an impiety. This space is neither sacred nor inaugurated, and the prohibition relates only to public order, and so the offence cannot be taken as a violation and pollution of a sacred place, as, for example, defined by the *lex Spoletina*.

In his remarks on the illegal burial and burning of corpses at *De legibus* 2.58 and 61, Cicero refers only to the Twelve Tables, where the origin of the prohibition was, according to him, the risk of fire. Further, he quotes a decree of the *pontifices* according to which it was «unlawful (*non esse ius*) for a grave to be made in a public place», and also that all such monuments built on public ground could be, and were demolished, for «a place which was public property could not be subjected to private cultic obligations». There is nothing about impiety in these rules. Moreover, none of the rules related to the building of graves within the city mentions impiety. Thus a rescript of Hadrian only punishes those who buried someone within the city,⁴⁷ and the Riccardi fragment of a constitution states that the place «where anyone shall have been interred or buried in contravention of these rules, is to be clear and unfettered by *religio*».⁴⁸

41 A pig in Macrobius, an ox at Furfo.

42 Tromp 1921: 118, about Macrobius.

43 Cicero *Leg.* 1.40; 2.9.22.

44 See Scheid 1981: 117–171, especially 137–146.

45 Livy 29.20–22.

46 Wissowa 1912: 393, note 4.

47 *Dig.* 47.12.3.

48 *Roman Statutes*, I, 490, col. 1.

Consequently no impiety, intentional or not, follows upon the violation of this kind of rule.⁴⁹ On the other hand, a tomb, once constructed and however constructed, was a *locus religiosus*, the property of the *di Manes*.⁵⁰ Even if built illegally, once the funeral had been celebrated and the deceased body buried within it, a tomb was a *res religiosa*. Those who demolished illegal tombs and transferred the buried bodies (in our case, the municipal authorities of the Colonia Genetiva) had to expiate their violation even of illegal tombs. This violation was obviously unintentional or at least without malice, because it was done with regard to public interest. The *duumvir* or *aedilis* probably offered a sacrifice to the *di Manes* before touching the tomb. So the *piaculum* mentioned by the chapter 73 of the *Lex Coloniae Genetivae* does not concern the individual who had violated the rule and cannot be used in our discussion.

The evidence we have examined thus far does not show any relaxing of the penalties imposed on an intentional *impius*. According to the evidence we have, which is complete and clear, an intentional offence against the gods was inexpiable. This rule was very explicitly defined around 100 BCE by Q. Mucius Scaevola, by the later evidence in Varro and Cicero, and also the exempla of the imperial period, which always describe the terrible end of the Gottesverächter.

But Mommsen and Wissowa were right, in at least one respect. The rules laid out in the edict of Q. Mucius Scaevola do contain a *mildere Praxis*. If we admit, as all jurists and historians do, that «in the beginning» there was only one degree of guilt, the inexpiable impiety, then the difference between intentional and unintentional offence, as repeated or instituted by Scaevola, represents great progress. The possibility was now officially given to the unintentional sinner to repair the damage done, and to expiate his deed himself. It is this difference we must analyse if we want to study the history of sin and guilt in Rome. I will return to it in a moment.

Before that, the apparently lack of concern on the part of the *pontifex maximus* Tiberius recorded by Tacitus must be addressed. Does it contradict the severity observed in the matter of the offences against the gods as claimed by Mucius Scaevola and Cicero? In fact, Tiberius' decision was not at all contrary to tradition. We find nearly the same formulation in Cicero's *De Legibus* 2.37, where an ideal statute is proposed: *periurii poena diuina exitium, humana dedecus*, «for the perjurer the punishment from the gods is destruction; the human punishment shall be disgrace». The infamy mentioned by Cicero, which was officially signified during the Republic by the mark of the censors, thus harmonizes with Tiberius' statement. It also agrees with the evidence of the so-called *leges sacratae*, that is, «followed by an oath» of the desecration: they never provide sanctions for the perjury itself, but only punish the refusal of taking the oath.⁵¹ Tiberius' statement is also very close to the

49 There is no relation between the situation defined by the lex of the Colonia Genetiva, and the story told by Suetonius, *Domitian* 8, of an imperial *libertus* who had built a tomb for his deceased son with stones destined to the reconstruction of the Capitoline Temple. Doing this he had committed a sort of *sacrilegium*, a theft of sacred property, aggravated by the pollution of almost sacred things by their contact with a deceased person. Domitian had the monument demolished, the stones, and the remains of the deceased person thrown into the sea. The anecdote is given among other examples of the extreme severity of Domitian. He exaggerated in considering the misappropriation of stones by his *libertus* an impiety, because the stolen stones still hadn't been consecrated, but only destined to the Capitol. Suetonius gives no other indication about the procedure. His story is not complete, it is limited only to the main decision of Domitian. What it doesn't tell are the expiation rites Domitian certainly had ordered because every opening, modification, and obviously every destruction of a grave was an impiety.

50 Wissowa 1912: 479.

51 Thomas 1988: 62–84, especially 68, footnote 25. See for example the Lex Latina of Bantia,

Emperor Severus Alexander's formulation of 223 CE in the *Codex Iustinianus*: *iuris iurandi contempta religio satis deum ultorem habet*, «the god's vengeance is enough for he who holds the respect due an oath in contempt».⁵² In other words, the convicted perjurer was not punished by mortal justice for his crime, but by the immortals themselves. The mortals only abandoned him as an *impius*.

There are examples of this kind of conduct. In 216 BCE, after the battle at Cannae, Hannibal sent some of the Romans whom he had made prisoners as ambassadors to Rome. They had all previously sworn to return to Hannibal's camp, but in order to fulfill the obligation of the oath without returning permanently, all or one of them returned to the Punic camp shortly after departure pretending to check one last detail. He, or they, now considered himself, or themselves, to be freed of the oath. The Romans were not very happy about this clever perjury. They did not give them back to Hannibal, but, says Livy, «the censors charged them with all possible infamy, to the point where a few of them killed themselves and the others were excluded for life not only from the forum, but even from light and public life».⁵³ As Cicero recalls, the censors were always extremely careful in matter of perjury.⁵⁴

7 Noxae deditio

We do not know if the civic community always «abandoned» the perjurer through a formal censure that excluded him from public and religious life, or if he was simply considered *impius* and henceforth ignored by everybody. The statements of both Tiberius and Severus Alexander imply that, even if the literary exempla insist on the vengeance of the offended god, the common rule was general contempt, since the emperors would not even accept an accusation of *maiestas* against the *divi* offended by a perjury. In any case, the statement of Tiberius agrees with the tradition: he did not propose to cancel the offence, but simply considered the perjurer an *impius*, whom he abandoned to divine vengeance. In other words, he pronounced what the jurists call *deditio noxae*, so-called noxal surrender.

Now, if we consider the treatment of *impium* in general we see, in fact, that *deditio noxae* was always practised. As a rule, the punishment for impiety was the ending of social contact with the *impius*, and his surrender to the injured party, i. e., to the offended god, in order that the god be permitted to take vengeance on him. As noted before, the gods have their revenge, on perjurers as on other *impium*.⁵⁵ The Romans always stress that divine anger represents an enormous danger for the whole city if the city does not end all relations with the guilty person.⁵⁶ This is precisely the system of the *deditio noxae* in civil and in

Roman Statutes, 200, 1. 16–20: (the elected candidates) *iouranto [ita ut ei i(n)fra s(c)riptum] est. eis ----- pro ae]de Castoris palam luci in forum uorsus a. s. o. [... seese quae ex h(ace) l(eg)e] oport[ebit] facturum neque sese aduorsum h(ance) l(egem) facturum scientem d(olo) m(a)lo neque seese facturum neque intercessurum [esse q(uo) h(ace) l(eg) minus setiusue fiat qu]ei ex h(ace) l(eg)e] non iourauerit is magistratum inperiumue nei petito neue gerito neue habeto neue in senatu [posthac sententiam deicito ne]iue quis sinito neue eum censor in senatum legito.*

52 *Cod. Iust.* 4.1.2.

53 Livy 22.61.9 and cf. 24.17.5–6; Valerius Maximus 4.1.10.

54 Cicero *Off.*: 3.31.111.

55 A tradition reported by the antiquarian Granius Flaccus, *De Indigitamentis*, fr. 8 (Huschke 109), king Numa had asked the gods by a vow to take vengeance for perjury («*Numam Pompilium, cum sacra Romanis conderet, uoto impetrasse, ut omnes dii falsum iuramentum uindicarent*»). Cf. also Livy 3.2.4–5; 29.18.8–9.

56 Livy 29.18.9.

international life, as it has been reconstructed by the jurists.⁵⁷ Fernand de Visscher, whose book on *deditio noxae* is still a common reference, defines *deditio noxae* as following, distinguishing between two phases:

The first phase begins as soon as the crime has been committed. During this phase the *deditio noxae* is only the right or the means of the group for escaping the impending vengeance. During this period the group can be freed by the exile or *dimissio*, the repudiation or the denial of the guilty person, as well as by any other act implying the ending of social contact with him. The second phase starts with the summons by the victim or his parents. The group of the guilty person now is forced to hand him over. From now on the group can only be freed by a *deditio noxae* to the victim or the victim's group.⁵⁸

De Visscher continues by noting that the obligation of *deditio noxae*, 'has never been sanctioned by a civil action but only by the coercive means of the magistrate. And it is possible to see these means enacted by public authority as a simple substitution of the collective vengeance against the refractory group and its head.'⁵⁹ The international *deditio*, which corresponds perfectly to this principle, shows that,

if, in circumstances in which the international customs consider it efficacious, the offered *deditio* is refused by the offended state, it will be sufficient to free the state of the guilty person from every guilt, even if its response is limited only to the expulsion of the guilty person from the city.⁶⁰

As the father of our Q. Mucius Scaevola stated during the famous case of the *deditio* of the consul Hostilius Mancinus in 137 BCE to an Iberian city, the *deditio* was a deed of sovereignty on the Roman side that was independent from the *receptio*, the formal acceptance, of Mancinus by the injured city. So whether the other party accepted the *deditio* or not, the *deditio* of Mancinus by the Romans was considered an expiation that would free the Roman people from the perjury committed by Mancinus. Transposed into a religious situation, one could say that by recognizing the status of inexpiable *impius* as that of the author of a crime against the gods, the Roman people freed itself from every responsibility.

In other words, in the traditional procedure, it was by publicly recognizing the offence and its author that the Roman authorities carried out the *derelictio* and ended the social contact with the guilty party. Now the procedure is exactly the same in the case of an offence against the gods. The crime and the name of the guilty person were publicly announced, one way or another, and the authorities decided if the sinner was definitely *impius* or not. In the case of a serious offence, that is, of an intentional action, the magistrates could also stress the ending of social contact with the *impius* by offering an expiatory sacrifice, possibly by repairing material damage, and eventually by inflicting a fine or another legal sanction onto the *impius* for the violation of public law or of his public

57 de Visscher 1947: Z. Lisowski, *RE Suppl.* VII (1940) s. v. *noxa* (cols. 587–603) and s. v. *noxalis actio* (cols. 604–663); Kaser 1971: 163–165.

58 de Visscher 1947: 50–51: «(...) permettent de distinguer dans le régime de l'abandon noxal deux phases très différentes. La première s'ouvre à l'instant même du délit: l'abandon noxal ne représente encore qu'un droit ou un moyen pour le groupe de l'offenseur d'échapper à la vengeance collective qui le menace. Pendant cette période, cette libération peut d'ailleurs être obtenue non seulement par un exil ou *dimissio*, répudiation ou désaveu, mais par tout acte de quelque nature qu'il soit, impliquant rupture de solidarité avec le coupable tels qu'une adoption, un affranchissement, une aliénation, etc. La deuxième phase s'ouvre avec une interpellation de la victime ou de ses parents. Le groupe de l'offenseur se voit sommé de livrer le coupable. Et à compter de cet acte de procédure, il n'obtiendra plus sa libération que par un abandon noxal effectué entre les mains mêmes de la victime ou de son clan.»

59 De Visscher 1947: 53.

60 De Visscher 1947: 137.

duties as a magistrate. It is now clear that these punishments were mainly intended to prove the innocence of the Roman community, which had prohibited all acts that could offend its divine partners. In any case, the procedure of *deditio noxae* as it is described is thus consistent with the statement of Tiberius, who on the one hand accepts the denunciation of a perjury, but on the other repeats the old principle of *deditio noxae* in one of his witty formulas. We have also seen that in the case of a private or an international offence, it was not a necessary consequence of the *deditio noxae* that the offended party have effective vengeance: the procedure of the *derelictio* of the guilty person to the offended party primarily recognized the offended party's right to take vengeance. The rest – the actualization of that right – was a private matter for the offended party. So the fact that the gods apparently don't react, as implied by the consequences of perjury in daily life, should not be interpreted as a token of religious indifference. On the contrary, it is the mark of tradition, and by no means signifies that the crime was not considered very serious.

As far as I know, the problem has never been framed in these terms. Generally, the jurists have used the anger of the gods as testified by the accounts of their interventions and the old legal formula *sacer esto* ('may he be consecrated' to the gods) as the ultimate explanation of the *deditio noxae*. The gods were considered to be offended by serious crimes because they supposedly protected morality and justice. Justice was thus founded on religion. There have been many discussions of this topic and it is not my subject here. I want only to analyze the process of the codification of divine vengeance as an example of the birth of a sacred law, one embedded within some overall conception of law. Nor do I want to open the question of the *sacratio* of criminals, which has recently been studied again by Roberto Fiori.⁶¹ As a matter of fact, except for the texts about perjury, there is no evidence that in the case of a divine offence, the *deditio noxae* of the *impius* actually constituted a formal *sacratio*. I would therefore make a distinction between these two procedures. In the former, the community hands over the guilty person to the offended god, which means that they let the god take vengeance if he so chooses. In the latter, they consecrate the guilty person to a god and so they make the guilty party into the property of the god. It is, in some ways, a gradation of the consequences of impiety. The *sacratio* should thus be understood as the solemn handing over of the guilty person, with his designation as *impius* implicit.

The *deditio noxae* is closely related to the right of the offended party to take vengeance. It has been often said that this right and duty were almost dead by the end of the Republic as a consequence of Sulla's reforms in 80 BCE. Yan Thomas has shown, however, that the right and even the duty to take vengeance had a positive valuation, which was in effect until the end of the first century CE. It was the intrusion into civil life of the emperor, the possessor of the right of life and death, that progressively made the function of vengeance vanish from forensic life. Until the beginning of the first century BCE, vengeance was often taken violently, and civil conflicts gave lots of opportunities to do so.⁶² Sulla's judicial reforms seemingly created a public way to settle conflicts. But in fact, this was only a new mode of taking vengeance, which continued to obtain for over a century.⁶³ As for the procedure of the *deditio noxae* of a free citizen, it finally disappeared only in the age of Justinian.

I would infer from this that the divine right to take vengeance, as acknowledged by the *deditio* of the intentional *impius*, was not necessarily an archaic institution. There is no

61 Fiori 1996.

62 Thomas 1984: 65–100, especially 67.

63 Thomas 1984: 68.

reason to believe that this right once existed but, in its application to religious offences alone, disappeared before the beginning of the first century BCE.

In contrast to private revenge, divine vengeance was never converted into a legal procedure to be settled in human courts. There were, in fact, a few attempts at the end of the second century BCE to go further and to create trials for impiety: the case of three Vestals in 114/113, and maybe the trial of M. Aemilius Scaurus in 104. But these specific trials were not the beginning of a new procedure. Nor can we accept Mommsen and Wissowa's idea that in certain regulations of the last century BCE the *piaculum* must be considered as the religious equivalent to the fine, the *multa*, as we have seen. The so-called *mildere Praxis* is thus not comparable with the institutionalization of vengeance of Sulla's reforms. Furthermore, as Yan Thomas stresses, these reforms are not to be perceived as a *mildere Praxis* of vengeance. As a matter of fact, in 80 BCE, vengeance took judicial form, and actually gained a new vitality for more than a century.

8 Civil theology

We can conclude, then, that even under the Empire, the punishment of religious guilt was formulated and carried out in a way that was simultaneously very traditional and in harmony with contemporary customs, the procedures of civil and public law not least among them.

Let us now come back to the rules at stake. Two facts are highly interesting in this procedure: the *deditio noxae* and the hierarchy of guilt. F. de Visscher and his fellow-jurists stress the fact that while *deditio noxae* actually represented a progression in juridical thought, it never developed into a formal civil process.⁶⁴ It always remained a part of public law; dependant on the coercive means of the magistrate, it was political rather than juridical. De Visscher writes:

The *deditio noxae* is not an arrangement based on a common legal rule and bringing the settlement of a litigation. As in the case of the extradition, it is a transaction by which one of the powers confronted surrenders one of its members in order to hand him over to the justice of the other power. It is a settlement from power to power, in a word, it is a political settlement.⁶⁵

De Visscher considers this practice as a remnant of a period when the settlement of conflicts between more or less independent groups was realized by agreements on specific details rather than by legal solutions founded on a common norm. This may be, but things had not changed much in the historical period, when we are confronted with public settlements between cities or families, done under the authority of the magistrates and priests, not under the authority of a common law. I would suggest translating the definition given by the jurists into historical terms, and consider the *deditio noxae* simply as a form of political settlement that allowed private or international vengeance to be taken.

According to that procedure, the political authorities of the city mediated between the two parties, arrogating to themselves control over vengeance, so to speak. This control was acted out through the designation of the guilty person, and on his provisional arrest, which

⁶⁴ De Visscher 1947: 26.

⁶⁵ De Visscher 1947: 71: «L'abandon noxal n'est point un arrangement qui apporte au litige une solution basée sur une règle juridique commune. De même que l'extradition, c'est une transaction par laquelle l'une des puissances en présence abandonne un de ses membres pour le livrer à la justice propre de l'autre puissance. C'est un règlement de puissance à puissance, en un mot, un règlement politique.»

both protected him from immediate retaliation, and also made sure he could be handed over to the injured party.⁶⁶ As a last step, Sulla's reforms reinforced public control of vengeance, as we have seen. *Deditio noxae* was thus closely related to the structures and ideology of the city, and should be understood as having developed alongside the development of civic institutions and conceptualization of law, and not as, for example, an archaic relic within classical practice.

The same is true for the second aspect of the procedure, the establishment of guilt. It matters little for my perspective whether or not there were two historical phases in the conception of responsibility: a first phase in which responsibility was collective, and a later phase after the invention of individual responsibility. I focus rather on the distinction between intentional and unintentional offences, which represents another intrusion of the *civitas* into the right to take vengeance. As Louis Gernet and Max Kaser have shown with regard to the development of Greek law and Roman *deditio noxae*, respectively, this distinctionbridles and controls the injured party's desire for vengeance.⁶⁷ The authorities arrest the presumed guilty person and examine, according to reason and justice, whether the crime was intentional or not. It is only after having verified and established the nature of his guilt that the authorities hand the guilty person over to the injured party.

If we now put this conclusion into a religious context, we notice that the traditional settlement of offences against the immortals depends on the same ideology of the city. The priests and the magistrates lay hands on the presumed guilty person, and check the degree of his guilt before handing the *noxium caput* over to divine vengeance. In other words, the temporal authority comes between a mortal and an immortal, deferring the divine right to vengeance while they rationally assess if divine revenge is justified. The offence itself is like all other offences: an injury to the prestige or the property of the gods. It is an external, material offence, such as one can commit against other citizens. Homicide is obviously not included, but the violation of a tomb can also be an injury to the physical integrity of a deceased person.

The logic underlying formal surrender seems to assimilate the guilty party to his criminal deed, and thus presents a heavily materialist conception of the offence, as of guilt. But that should not be taken to exclude the presence within contemporaneous habits of mind of the notion of intent and of inferiority. A clear distinction is drawn between an intentional and unintentional offence, sometimes by the guilty persons themselves. But all attested cases of repentance and remorse concern unintentional injuries. Those who acted with malicious intent are apparently ignorant of repentance and remorse. The literary exempla that describe the traditional rule – namely, that involving a notionally-archaic, inexpiable guilt – all present the *impius* as remorseless and suffering the terrible vengeance of the gods, which is often figured as a kind of retaliation.

But is this understanding of guilt, however widely shared by historians and poets, the only one obtaining in Roman society? And if there is another, what are their chronological, conceptual and aetiological relations? To find an answer, we must turn to different books, where we do indeed find different or, rather, complementary conceptions of guilt. We do not have Roman tragedies of the fifth century BCE like scholars of Greek history do, and so we must be satisfied with philosophical texts from the first century BCE. Cicero, for example, who firmly states in his *De legibus* that intentional impiety is inexpiable,

⁶⁶ Svenbro 1984 has shown that in archaic Greece, by the creation of criminal law, the city had appropriated the right to take vengeance, restricting so the prestige which the big families won by taking vengeance for every offence.

⁶⁷ Gernet 1917: 147.

nevertheless describes the *impius* as feeling guilty and assailed by remorse.⁶⁸ Whatever the reasons for this remorse, whether regret for having violated a natural law⁶⁹ or some tenet of morality,⁷⁰ it is evident in his conception that guilt is an interior feeling. Some years ago I presented this interiority of guilt as an innovation. Today I would rather say that we cannot use texts like the ones I have quoted in order to reconstruct the evolution of the concept of guilt, because we do not have at our disposal a fifth-century BCE Cicero, whose conception of guilt could be compared with later ones. The evidence that I once deployed to show a chronological development, I now take to be incommensurate.

I would therefore consider the material and the psychological representation of guilt and impiety as two different and complementary approaches. I would not rule out that the archaic period knew interiority, but only claim that the balance between objective and interiorized guilt was different. The predominant conception of impiety, at least during the historical period, concerned the civic relations between mortals and immortals, without taking into account the guilty person and his conscience. Cicero himself stresses that it was in the city's interest that people respect natural law, by which he intends philosophical prescriptions.⁷¹

In any case, like *deditio noxae*, the handing over of the inextinguishable *impius* to the offended god bears the seal of polis-ideology. In this procedure the gods are treated like fellow-citizens or like another city. They are subject to the same laws as the other partners of the city. This is not an isolated phenomenon. In Rome, the same relationship is implied or, rather, reified by the procedure of divination, by the notion of sacred, by the opposition between piety and superstition, as well as by Roman myth. According to all of these traditional institutions, notions, or tales, the gods are supposed to behave like fellow-citizens, respectful of the civil pact, and not like jealous and brutal tyrants. In a religious system without revelation or a Holy Book, punitive sanctions for impiety are very important. Far more than the features of a dialogue with the gods or the status of their property, the right to take vengeance ritually defines the very nature of the immortals.

The rules analyzed here actually state a very central point of Roman theology. Q. Mucius Scaevola and his followers called it the civic theology, and in fact, it was closely linked to the city and its fundamental representations. One can even suppose that it was related to the development of polis-ideology during the sixth and fifth centuries BCE. According to the civic theology elaborated by Roman scholars, experts, and poets analyzing their ritual traditions, the gods submitted of their own free will to the rationality of the city and protected it. Like the Roman elite, the gods were supposed to respect the dignity and the freedom of their fellow-citizens. They obviously needed to convince the Romans of their good intentions. The repeated sharp attacks of Roman intellectuals on superstition, and the occasional public repression of the same, show that the contest between civic religion and superstition lasted forever. Civic theology always remained in contestation in Roman religion.

68 Cicero *Leg.* 1.40.

69 Cicero *Leg.* 1.40, 2.15–16.

70 Cicero *Off.* 3.104: in this passage he stresses that actually, in daily life, the gods do not care for perjury.

71 Cicero *Leg.* 2.16.

9 The commentaries of sacred law

Now having speculated for a moment as to what would have been the *commentarii* of sacred law and its *regulae* had they survived, let us now turn to a final element. Since there was no literature about sacred law created by the authorities, the interpretation of sacred law was actually done by what one might call lay experts, that is, by scholars, writing books on the rules of this or that ritual. When, for example, Augustus inaugurated his religious restoration, he had no comprehensive official book to rely on. So he asked lawyers and antiquarians to write treatises about the religious institutions he was interested in. This tradition of religious knowledge and interpretation had existed since at least the fourth century BCE. It was always the province of private scholars, writing books that were learned but not official. The purpose of this literature was to comment upon religious terminology, and in large part, to question the ultimate meaning of things. As rituals – political or religious – represented the most venerable tradition, scholars used them to look beyond Roman reality for something else, for some deeper meaning that was supposedly buried under the surface of traditional concatenations of gestures and words. The most famous example of this kind of scholarship is the *Antiquities* of Marcus Terentius Varro. In his encyclopaedic project, Varro proceeds in this manner in general, not simply in religious matters. As Cicero tells us, paraphrasing the general plan of the books, Varro's *Divine Antiquities* were not only a collection of all traditional religious institutions, but also an account of their justification. Or to put it in Varro's words, after describing what, where and by whom, one must also ask why it was done. As Cicero writes, Varro's book of aetiological research led the Romans home in a city where they used to wander around like foreigners eager to discover the meaning of it all. Varro is indeed an extreme case, and Cicero's compliment perhaps carries a sting. But the ambitions and method of his work can nevertheless enlighten us. For Varro was able to give the reasons for every institution, and to make use of every known method of scientific investigation, from etymology to philosophical reference. In this form of exegesis, there was no question of truth, as it is asked today. For the Romans, the only dogma and certainty was ritual obligation, and explaining gods and rituals was a business for scholars, not for priests. The rules governing erudite comments of ancient scholars were common sense and logic, whatever the premises of reasoning were. One could be wrong in forgetting to celebrate a ritual, or in ignoring the specific rules of an exegetic technique, but not in relation to a pre-existing truth. Speculation was done by stages, by progressive approach. For most of the people, truth consisted in accumulating the greatest possible number of interpretations. Commentary and theory about gods and cult were very important things; they were always linked to ritual, but they depended entirely on ritual and could not replace it.

The innovation of Augustus was the systematic resort to scholars for his reconstruction of the rules regarding religious institutions that had been abandoned or neglected for two or three generations.⁷² His example also provides a clear argument against the theory of ritual books, that the Romans must have possessed sacred writings, or writings on sacred matters, that laid out not only the precise forms of rituals but their genesis and rationale. If the most powerful man in Rome needed to hire antiquarians to do research into ritual tradition, then it must be concluded that there was no such comprehensive and easily accessible written tradition about Roman religion.⁷³

72 Cf. Scheid 1999.

73 With regard to the delicate political problems (see Scheid 1999), one can suppose that Augustus avoided to consult the priests. But that could be the case for the pontiffs, but not for the quindecimviri.

Chapter 2

Religion in the *lex Ursonensis*

by

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1 *Lex Coloniae Iuliae Genetivae*: General remarks

The late republican *lex Ursonensis* professes a type of legal reasoning that should be understood as an innovation of the first century BCE.¹ Rome, that is, the Roman senate and Roman magistrates, had dealt with religion before; by the second century, the role of religious agent(s) had acquired a much more explicit character in legislating on religion, as seen in the *senatus consultum de Bacchanalibus* (186 BCE), the *leges Aelia et Fufiae* of the late second century and other rulings on augury.² All of these regulations, however, dealt with religion as part of the urban texture of power and politics. Only occasionally, for example, in the repression of the Bacchanalia and Bacchants or in procuring prodigies external to Rome,³ did Roman politicians have to think about religion outside of Rome. Occasional interventions into foreign religious conflicts – mostly concerning legitimacy and resources – did not amount to a coherent body of regulations but seemed to follow the rationale of preserving or establishing internal structures on the part of the ruled group that were compatible to Roman aristocratic practices of policy-making.⁴

An *argumentum e silentio* is weak, but frequently necessary. As far as the *lex Ursonensis* is concerned, it is clearly a conglomerate, composed of building blocks, some of which were older.⁵ And yet, one should not seek for models that were much older. It is not very probable that any encompassing legal composition had been prepared more than one or two decades before – if any at all; Cicero's *De legibus*, the archaizing collections of laws, dates from the fifties BCE, and the systematic treatises concerning religion prominent in Varro – I think of Aelius Stilo, for example – are not much older. The surviving parts of the *lex Iulia municipalis*, if we identify the second part of the *Tabula Heracleensis* (lines 83–163) with this Caesarian law of 45 BCE,⁶ do not allow us to suppose any direct relationship between it and the *lex Ursonensis*. We do not have any indication that religion was a topic of the *lex Iulia municipalis*. The heterogeneous origin of this collection of norms displayed at the

south Italian city of Heraclea reveal the lack of a comprehensive law: it was composed as a law for Italian colonies and *municipia* on the basis of norms addressed to the city of Rome. Additionally, the incoherence of the charter of Urso itself speaks for a recent composition by the time of its passing as a law. And nothing was to follow. When the *lex* was republished on bronze tablets at the same time as the charters of Salpensa and Malaca,⁷ more than a hundred years afterwards, i. e., by the end of the first century CE, the probable reason was that it had not been superseded by anything and was itself a prestigious model.⁸

Discovered beginning in 1870–1 at Osuna, Spain, the surviving fragments contain about one third of all of the regulations for the Caesarian colony of *Iulia Genetiva Ursonensis*, founded in 44 BCE on the initiative of an unknown person who had won Caesar's support for his plan.⁹ The surviving chapters 61–82, 91–109, and 123–134 do not have any explicit overall structure. The same holds true for the fragments of the Flavian municipal laws. At the same time, principles of ordering are recognizable in the *lex Ursonensis* and reveal significant differences in comparison with the later texts. Thus, it is necessary to deal with the composition before delving into the details of the religious regulation.

2 The concept of religion

Within the surviving fragments, the material concerning <religion> in our sense is contained within chapters 64 to 72 and 125 to 128. Of course, these chapters do not exhaust our notion of religion and what we know about ancient religious practices, but there is no reason to suppose that the charter contained further chapters directly addressing religious matters. As far as I know, there are no regulations on matters religious in any other colonial or municipal norm that are not included in the passages named.

The section from chapter 64 to 72 is composed of regulations on the local definition and financing of cult (64–65), on pontiffs and augurs (66–68), the procedure for payments for ritual ingredients (69), the organization and financing of games (70–71), and the administration of money given to temples (72). The passage coheres through the repetition of the word *sacra*: *quae sacra fieri publice placeat et quos ea sacra facere placeat ... eaque sacra ...* (64); *at ea sacra, quae in colon(ia) alioque quo loco colonorum nomine fia(n)t* (two times in 65); *quae ad sacra resq(ue) diuinas opus erunt* and *[ad] ea sacra, quae in colon(ia) alioque quo loco publice fiant* (69), similarly in 70, and finally *in aedis sacras* and *eis sacris superfuerit, quae sacra* in 72. There are three chapters on priesthoods (66–68) inserted and framed by chapters regulating the financing of cult. These inserted chapters do not contain the term *sacra* nor the general notion of *sacerdotes*. The regulations restrict themselves to talking of *pontifices* and *augures*. The composition clearly indicates the lack of a term for or the lack of an interest in a unified concept of religion. It is the concrete *sacra*, public rituals, that form the most general concept applied.

What about the limits of this concept and the placing of the sequence of chapters on *sacra* within the context of the *lex coloniae*? The chapters form part of a longer sequence formulating norms for the magistrates of the colony: *Iluii quicumque erunt* or *Iluii, qui primi* form the beginnings of the chapters 62 to 64 and are echoed in the following chapters. Chapter 73, on the contrary, begins a series of norms formulating prohibitions or

1 Cf. Beard 1986 for late republican religious reasoning in general. I am grateful to Simon Price for having given me the opportunity to present this argumentation at the Centre for Classical Studies of Oxford University.

2 Pailler 1988 for the SC; see Sumner 1963; Astin 1964; Linderski 1995; Libero 1992 for legislation on *obnuntiatio*.

3 For the latter see MacBain 1982.

4 *Senatusconsulta de Thisbaeis, Oropiis, Aphrodisiensibus*.

5 See Gabba 1988: 162 f. for archaic features.

6 I follow the pragmatic stance of Crawford 1996: 362. See Cic. *Fam.* 6.18.1 for a possible date and *CIL* 5. 2864 = *ILS* 5406 for the name.

7 Gabba 1988: 158.

8 This might be detected by anachronisms, etc. That is, if such a model existed, it must have been roughly contemporaneous to the foundation date of the colony.

9 See Gabba 1988: 160–162.

positive regulations addressed to every possible agent: *ne quis* or *qui* open these paragraphs. The first two of these bans deal with the burial and burning of corpses. Do they form part of the religious regulations?¹⁰

There is no relation or semantic bond here to the previous chapters. The term *religio* or *loca religiosa*, applied to burial sites and private obligations to the cult of the dead, does not appear. On the other hand, a train of thought leading from the publicly financed cults through the money given by private initiative in chapter 72 to the realm of private cult implied by burial could be imagined. Such a line of reasoning is exemplified by the slightly earlier text of Cicero's *De legibus*. The legislation on religion in book 2 finishes by the affirmation of private cults and a few thoughts on the *di manes*: *Sacra priuata perpetua manento. deorum manium iura sancta sunt. <bo>nos leto datos diuos habento. sumptum in ollos luctumque minuunt* (2.22). The discussion as developed in the talk among Atticus, Quintus and Marcus Tullius Cicero, has a *lacuna* at the decisive transition (2.53). Yet it clearly affirms the connection: *Iam tanta religio est sepulcrorum, ut extra sacra et gentem inferri fas negent esse* ... (2.55). Here, the semantic bonds are evident. It has to be noted, however, that in the fictitious legal text proper, burial practices are not dealt with.

This leads us back to the *lex Ursonensis*. We cannot exclude an association between *sacra* and illegal burial in the mind of the author, but the text painstakingly avoids any such connection. In formulation and content, the chapters on illegal burial are part of the following section on illegal building and the maintenance of public space, regulations also prominent in the *Tabula Heracleensis*. As in Cicero, *sacra privata*, private religion, is not regarded as an object of public legislation. And yet, a religious dimension of the problem of illegal burial cannot be entirely dismissed by the author. Instead of a sanction in the form of a fine or the threat of persecution, the religious framing of the countermeasures is stressed: *Si aduersus ea mortuus inlatus positusue erit, expianto uti oportebit* (73).

It is more difficult to define the relationship of chapters 64 to 72 to the preceding chapters, since the surviving portion of the text starts in the middle of chapter 61, which deals with the juridical procedure of *manus iniectio*, and ends by stressing the jurisdiction of the duumvirs.¹¹ Chapters 62 and 63 describe the attendants (*apparitores*) of the higher magistrates, the duumvirs and the aediles, and their salary. The list includes *haruspices* and *tibicines*, specialists for extispicy and flute players, at its end. These figure within a much longer list, however, and there is no reason to associate them with the definition of festivals in chapter 64; priests are not dealt with before chapter 66. It is much easier to suppose an association of catchwords between the payments at the end of the year in chapter 63 and the definition of costly dates at the beginning of the year in chapter 64. There is no general conception of religion that could serve as an overall structure, as was vaguely suggested by Crawford.¹²

To complete this picture it is necessary to turn to the other, rather isolated chapters dealing with religious matters. Pontiffs and augurs, grouped together with the preceding decurions, are the subject of chapter 91. It prescribes that any newly elected decurion or priest must own a residence at least within one thousand paces of the town that could serve as a pledge.¹³ Since the preceding seven chapters are in the lost fifth column of tablet b, the

10 See Crawford 1996: 397: <... religious matters, chs. LXIV–LXXII, to which two chapters on regulations for burial form a natural pendant.>

11 See Crawford 1996: 433 ad loc.

12 Crawford 1996: 397.

13 Thus, *contra* Crawford 1996: 440 ad loc. and translation, it would be senseless to interpret *annis V proxumis* as the period directly preceding the appointment. The chapter does not aim at the restriction of the offices to long term inhabitants, but to ensure their factual liability in cases of

context can not be reconstructed beyond any doubt. Yet, the following chapters suggest that 91 is an integral part of a sequence dealing with the decurions and, in particular, with questions of liability.

The subject of chapters 125–128 is the regulation of games. Here, the context is clearer. The question of the dignity and authority of the decurions and magistrates is discussed from at least chapter 124 and onwards. Hence three of the four chapters on games (125–127) exclusively deal with the order of seats for different status groups during different types of *ludi*, even treating the problems of the presence of higher provincial magistrates or Roman senators and their sons (127). Chapter 128 describes the organization of all kinds of religious cult by the annual appointment of *magistri* and their control. The presence of chapter 128 is certainly partly due to the intention of completing the regulations of the games, but its main *raison d'être* is the continuation of the detailed discussion of the division of labor and authority between the magistrates and the decurions. Thus, more or less like chapters 126, 129, 130 and 131, chapter 128 opens: *II(uir) aed(ilis) pra(e)fectus c(oloniae) G(enetiuae) I(uliae) quicumque erit* ...

What have we learnt about the law's notion of religion? First, religion is dealt with insofar, and only insofar as it is public religion. There is religion outside public religion – otherwise the author would not need to stress to talk about *quae sacra fieri publice placeat*, i. e., about the public cult of the colony. But this religion is not covered by any regulation. For example, in talking about *collegia*, there is no indication that the *lex Ursonensis* (106) or the *lex Irnitana* (74) have anything in mind other than the outlawing of *coetus*, i. e., of ganging up or a riotous assembly.¹⁴ If cults formed *collegia*, there was simply no visible interest in their regulation.¹⁵

Finally, as far as the author of the *lex Ursonensis* is concerned, to talk about religion is to talk about rituals. The most general term employed is *sacra*;¹⁶ rituals could be specified as *ludi circenses* and *scaenici*, <games and plays>, and even *gladiatores*, <gladiators>, *sacrificia*, <sacrifices>, and *puluinaria*, meals prepared for the statues of the gods.¹⁷ These rituals are dependent on public money and the action of the decurions and magistrates. Religion comes into focus only as it relates to the competence of magistrates. It is a primary duty, one to be regulated early in their year of office: the festivals have to be defined within the first ten days (64), and concrete measures and financial regulations have to be completed within sixty days (69). In the view of the *lex Ursonensis*, religion is not something to be instrumentalized, to be regulated or tolerated, but is a part, an important part even, of the business of a Roman colony's magistrates.

fraud etc. during a five years' test period. Otherwise the ensuing regulation concerning the removal from office would be irrelevant: the conditions would have to be validated before the entrance into office. Without discussing the inclusion of priests, Mommsen formulates a similar conclusion for the decurions (1875: 223 [134]).

14 See González 1986: 223 f.

15 A divergent approach is taken by Kippenberg 2002, who, however, does not discuss the evidence from the municipal laws.

16 The singular *res(que) diuinas*, as added to *sacra* in ch. 69, might denote the whole infrastructure of ritual, that is temples, instruments etc.

17 See ch. 128. Thus the translation of Ames 1998: 66; cf. Crawford: <preparing of couches>.

3 The calendar of festivals

If religion is such an important part of towns of Roman citizens, it is important to determine its features. Festivals, time and space, the choice of gods, priesthoods, rituals could be parameters to define the 'Romanness' of the colony. The first question to ask is whether the Roman calendar served as the temporal framework of the political and religious in Urso. We do not know of any law prescribing the use of the Roman calendar outside of Rome; a Greek lunisolar calendar was in use in the Augustan colony of Tauromenium, attested by an intercalary month *Apellaios deúteros* and Greek dates in numerous inscriptions.¹⁸ And yet, a centrally-placed calendar could indicate a relationship with the Roman calendar. The Roman government and military used Roman dates for its administrative purposes without hesitation.¹⁹ The famous Gallic calendar of Coligny systematizes and displays an indigenous system using the technical devices of the Roman *fasti* and thereby attesting how widespread this calendar was in the Western part of the Mediterranean.²⁰ In some instances, Roman dates are used in norms that are applied to policies outside of Rome, e. g., the *kalendae Ianuariae* and the *eidus Martiae* in a late republican *lex agraria*,²¹ or the *kalendae Quinctiles* in the part of the *Tabula Heracleensis* that might be quoted from the *lex Iulia municipalis*.²²

Such dates also appear in the *lex coloniae Genetivae*. In chapter 63 the *kalendae Ianuariae* are used to define a period of service of the first ever attendants of the colony. In chapter 81 *nundinae* are presupposed; the publicity of the market-days would form the best occasion for the administration of the oaths of the public scribes. There is no reason, however, to identify these *nundinae* with the rhythms of eight days known from the city of Rome; they might, for example, have been organized only two times a month.²³ As the relative dating of all deadlines – 'within five or sixty or similar days from their entering of office' – demonstrates, not even the periods of office are prescribed in terms of the Julian calendar. Presupposing the technical skeleton of the Julian calendar, its use in organizing the temporal structure of the life of the colony is left to the colonists.

The principle can be nicely illustrated by regarding the definition of cults as it is formulated in chapter 64:²⁴

LXIII. Iluiri quicumque post colon(iam) deductam erunt, ii in diebus X proxumis, quibus eum mag(istratum) gerere coeperint, at decuriones referunto, cum non minus duae partes ader(u)nt, quos et quot dies festos esse et quae sacra fieri publice placeat et quos ea sacra facere placeat. quot ex eis rebus decurionum maior pars, qui tum aderunt, decreuerint statuerint, id ius ratumque esto, eaque sacra eique dies festi in ea colon(ia) sunt.

LXIII. Whoever shall be duumvirs after the foundation of the colony, they, within the ten days next after that on which they shall have begun to hold that magistracy, are to raise with the decurions, when not less than two-thirds shall be present, which and how many days it may be agreed shall be festivals and which sacrifices shall be publicly performed and who shall perform those sacrifices. And whatever of those matters a majority of the decurions who shall then be present shall have decreed or decided, that is to be legal and binding, and there are to be those sacrifices and those festival days in that colony (trans. Crawford).

18 See Rüpke 1995: 135 f.; Ruck 1996.

19 Ando 2000: 408.

20 Coligny: e. g. Olmsted 1992; Monard 1999; edition: *RIG* 3 (Duval).

21 Crawford 1996: no. 2.63, 70.

22 Crawford 1996: no. 24.98.

23 Mommsen 1875: 260 (108), pointing to *CIL* 8.6357 = *ILS* 6868; for market days, see Nolle 1982; Fryan 1993; Ligt 1993.

24 See Rüpke 1995: 534–546 for the following.

The theological, personal, and temporal structure of the public cult at Urso is subject to a majority decision, which conforms to the Varronian notion of festivals. Their names are political terms, *ciuilia uocabula*.²⁵ The precision is a negative one. *Dies festi* denotes public ritual and merry-making, open to human organization. The *lex* does not speak of *feriae*, days owned by the gods due to consecration.²⁶ Thus, the annual change of the list, implied by *Iluiri quicumque*,²⁷ would not be problematic in religious terms. Yet, neither the author nor the duumvirs intended an annually changing list.²⁸ The early deadline demonstrates an awareness of the problems of late indication of festivals, something which troubled the late Republic. Practically, the situation must have been even more stable. The continuation of *sacra*, once established, must have been the normal way, with the exception of variations according to special calendrical circumstances (mostly abolished by the Julian calendar) or the addition of new or unique festivals. Perhaps, the announcement of festivals of a longer periodicity – every four years, for instance – were the most disturbing element. It has to be stressed that Roman practice was already acquainted with *fasti* listing annual festivals, but ritually relied on the monthly oral announcement of festivals by the *rex sacrorum*, mixing *feriae indictivae* without fixed days and fixed *feriae stativae*.²⁹ Under these circumstances, the lack of municipal and colonial *ferialia*, complete epigraphical lists of local festivals, seems rather normal.

The calendrical practices of Roman colonies might be illustrated by the so-called '*Fasti*' *Guidizzolenses*, probably related to the territory of the *colonia civica Augusta Brixia*. This small-scale inscription was probably a private product; the original size must have been around fifty-five to thirty centimeters.³⁰ The calendar is reduced to monthly columns naming only the Kalends, Nones and Ides and the distance to these dates. No juridical character, no nundinal sequence of days, no festivals or dedications days are indicated. All the necessary information on festivals is given in a list to the right of the calendar, a small *feriale*. Such calendars must have also been in use in Urso. The Brixian use of stone for the festival list indicates its stability, but the form of the calendar would rarely invite anybody to have such an instrument be produced as a representative inscription.

4 Space

Before we can deal with the choice of cults, attention must be given to the spatial implications of the *lex*. It must be stressed that the borderline produced by the foundation rite – 'where the plough will have been drawn around' – is mentioned by chapter 73 only, that is, after the end of the 'religious' or *sacra* section. In this context, it is the boundary line for the *oppidum* proper, within which corpses should be neither inferred nor burnt nor tombstones erected. In contrast to that, the location of public cults is not regulated at all. The possibility of performing *sacra publica* even outside the colony is mentioned several times, always without the air of being an exception.³¹ The public character of cults is not a matter of space, but of initiators and financing.

25 Varro *Ling.* 6.12.

26 See Rüpke 1995: 492–500.

27 Misinterpreted by González 1986: 236.

28 I doubt the conclusion to the contrary by Crawford (1996: 434, drawing on Scheid 1992).

29 See Rüpke 1995: 231–234, 535 f.

30 See Rüpke 1995: 160–164.

31 See ch. 65: *sacra, quae in colon(ia) alioque quo loco colonorum nomine fiant*.

5 Choice of cults

Apart from the financial logic of the chapters 64 and 65,³² there are no norms whatsoever as far as the selection of the deities to be venerated is concerned. The general regulations in chapters 64, 65 and 128 imply a wide range of sanctuaries, deities and rituals. Indirectly, however, two festivals are given an important status *a priori*. Chapters 70 and 71 oblige the highest magistrates of the colony to organize <shows>³³ or plays: the duumvirs were to devote four days to the Capitoline triad by the duumvirs; the aediles, three days to the same deities (Jupiter, Minerva, and Juno) and a fourth day to Venus:

[L]XX. *Iluir quicu[m]que erunt, ei praeter eos, qui primi post h(anc) l(egem) [fa]cti erunt, ei in suo mag(istratu) munus ludos scaenicos Ioui Iunoni Mineruae deis deabusq(ue) quadriduom m(aiore) p(arte) diei, quot eius fieri (poter)it, arbitratu decurionum faciunt inque eis ludis eoque munere unusquisque eorum de sua pecunia ne minus (sestertium) (bina milia) consumito et ex pecunia publica in sing(ulos) Iluir(os) d(um)t(axat) (sestertium) (bina milia) sumere consumere liceto, i(t)que eis s(ine) f(rau)de s(ua) facere liceto, dum ne quis ex ea pecun(ia)umat neue adtributionem faciat, quam pecuniam h(ac) l(eg)e ad ea sacra, quae in colon(ia) alioque quo loco public(a)e fient, dari adtribui oportebit.*

[L]XX. Whoever shall be duumvirs, they, except for those who shall be first appointed after this statute, they during their magistracy are to organize a show or dramatic spectacle for Jupiter, Juno, Minerva, and the gods and goddesses, during four days, for the greater part of the day, as far as (shall be possible), according to the decision of the decurions, and each one of them is to spend on that spectacle and on that show not less than 2,000 sesterces from his own money, and it is to be lawful to take and spend out of public money up to 2,000 sesterces for each duumvir, and it is to be lawful for them to do so without personal liability, provided that no-one take or make assignment from that sum, which sum it shall be appropriate to five or assign according to this statute for those sacrifices, which shall be publicly performed in the colony or in any other place.

LXXI. *Aediles quicumq(ue) erunt in suo mag(istratu) munus ludos scaenicos Ioui Iunoni Mineruae triduum maiore parte diei, quot eius fieri poterit, et unum diem in circo aut in foro Veneri faciunt, inque eis ludis eoque munere unusquisque eorum de sua pecunia ne minus (sestertium) (bina milia) consumito de(q)ue publico in sing(ulos) aedil(es) (sestertium) (singula milia) sumere liceto, eamq(ue) pecuniam Iluir praefectusue dandam adtribuendam curanto itque iis s(ine) f(rau)de s(ua) c(apere) liceto.*

LXXI. Whoever shall be aediles, during their magistracy they are to organize a show or dramatic spectacle for Jupiter, Juno, and Minerva, during three days, for the greater part of the day, as far as shall be possible, and during one day (games) in the circus or (gladiators) in the forum for Venus, and each one of them is to spend on that spectacle and on that show not less than 2,000 sesterces from his own money, and it is to be lawful to take from public funds 1,000 sesterces for each aedile, and a duumvir or prefect is to see that that sum is given or assigned, and it is to be lawful for them to receive it without personal liability (trans. Crawford).

The doubling of the games and the mixture of public and private spending produce a competitive situation, ensuring a high level of engagement, furthered by the definition of a minimum length and a private minimum sum to be spent.³⁴ Euergetism had to be taught to the new <elite> of the new colony.³⁵ Thus, the divine addressees are given ritual stress and a high symbolic position among an annual festival cycle still unknown. The combination of the deities assure the Roman character of the triad.³⁶ Flanked by Minerva and Juno, Jupiter is no Zeus, nor could Juno be understood as a local mother goddess. Furthermore, the

32 See below.

33 The term *munus* need not refer to gladiatorial shows pace Crawford 1996: 395.

34 These expenses are rightly paralleled with *summae honorariae* by D'Ors 1986: 163. Cf. Veyne 1976 for the financing of games and the liturgical system in the general.

35 I am grateful to Andreas Bendlin for this remark.

36 For the Roman prehistory of games to the Capitoline triad see F. Bernstein 1998.

presence of these political deities is primarily neither temporal nor spatial, but ritual. Thus, the symbolic link to Rome is intimately tied to the top tier of the locally ruling elite, the highest magistracies. In terms of ritual expenditure, the popularity of the upstarts is directly linked to the cult of the Roman triad. To a lesser degree, the same mechanism is applied to the deity associated with the founder of the colony, Venus or rather, Venus Genetrix, a deity intensely cherished by late republican aristocrats.³⁷

The analysis of the *lex Ursonensis* can not be conducted in isolation from later developments. The charter of the *municipium Flavium Irnitatum* in central Hispania Baetica shows regulations applied to a colony founded in an existing community that is allowed to continue its festival practice insofar as its elements have not been ruled illegal before.³⁸ The formal procedure is similar to the practices at Urso,³⁹ but the resulting list of days unsuitable for legal business is distorted – or characterized – by festivals of the imperial family, calendrically defined at Rome:

R(ubrica). Quibus diebus res ne iudicentur et in quos in tertium ne detur. – Ne quis (qui) in eo municipio i(ure) d(icundo) p(raerit) is diebus iudicem arbitrum recipatores rem priuatam iudicare sinito, neue in eos dies in tertium dato, quos dies propter uenerationem domus Augustae festos feriarumue numero esse haberique o(p)ortet oportebit, quibusque diebus ex decurionum conscriptorumue decreto spectacula in [e]o[m] municipio edentur, epulum aut uesceratio municipibus aut cena decurionibus conscriptisue municipum impensa dabitur, quibusque diebus comitia in eo municipio erunt (qu)ique dies h(ac) l(eg)e constituti erunt per quos messis et uindemiae causa re[s] prolatae sint, nisi si index arbitru(e) aut recipatores et quorum res agetur omnes dum d(e) e(a) r(e) agi uolent, neque is dies erit quem propter uenerationem domus Augustae festum feriarumue numero esse haberique oportebit. neue quis index neue arbitru(e) in biduo proximo iudicandi causa denuntiatio, nisi si iudex arbitru(e) et quorum res agetur omnes tum de e(a) r(e) agi uolent, neue is dies erit quem propter uenerationem domus Augustae festum feriarumue numero esse haberique oportebit. quod aduersus ea factum erit [id] ratum ne esto.⁴⁰

Rubric. On what days matters may not be judged and for what days notice for the third day may not be granted. – Whoever is in charge of the administration of justice in that municipium is not to allow a *iudex* or *arbiter* or *recuperatores* to judge a private matter on those days nor is he to grant notice for the third day for those days which it is or will be appropriate to have or regard as feast-days or in the category of festivals because of the worship of the Imperial house, and on the days on which games are given in that municipium by decree of the decurions or *conscripti* or a meal or distribution of meat is given to the *municipes* or a dinner to the decurions or *conscripti* at the expense of the *municipes*, and on the days on which there are assemblies in that municipium, and on the days which are fixed under this statute as the days on which business is postponed because of harvest or vintage; except if the *iudex* or *arbiter* or *recuperatores* and those whose matter is being heard all wish it to be heard then and it is not a day which it is appropriate to have or regard as a feast-day or in the category of festivals because of the worship of the Imperial house. No *iudex* or *arbiter* or *recuperator* is to judge a private matter on those days which have been laid down above or value a case or devote attention for the sake of judging or express an opinion for the sake of judging, except if the *iudex* or *arbiter* or *recuperatores* and those whose matter is being heard all wish it to be heard then and it is not a day which it is appropriate to have or regard as a feast-day or in the category of festivals because of the worship of the Imperial house. And no one is to serve notice for the third day for those days to an adversary or a *iudex* or *arbiter* within the previous two days for the sake of judging, except if the *iudex* or *arbiter* and those whose case is

37 See Sauron 1994.

38 See *lex Irnitana* ch. 81 (9A. 21 –28).

39 See, e. g., the early definition of vintage holidays in *lex Irnit.* 5C. 24–45 (ch. K); cf. *Dig.* 2.12.4.

40 *Lex Irnit.* 10C. 25–51 (ch. 92).

being heard all wish it to be heard then and it is not a day which it is appropriate to have or regard as a feast-day or in the category of festivals because of the worship of the Imperial house. Whatever is done contrary to these rules, is not to be legal or valid (trans. Crawford).⁴¹

The complicated and vague terminology of *dies quem propter uenerationem domus Augustae festum feriarumue numero esse haberique oportet* suggests a centrally defined character and fixing of these days.⁴² Urban religion, *«Staatsreligion»*, to use the words of Georg Wissowa, is replaced by court religion, *«Hofreligion.»*⁴³ The dissolution of spatial referentiality is accompanied by a temporal centralization.

6 Priesthoods⁴⁴

Chapters 66–68 of the *lex Ursonensis* prescribe the institutionalization of two priesthoods, pontiffs and augurs, which by their names and specific regulations point to the city of Rome:

LXVI. Quos pontifices quosque augures C(aius) Caesar, quiue iussu eius colon(ia)m deduxerit, fecerit ex colon(ia) Genet(iua), ei pon(t)ifices eique augures c(oniae) G(enetiuae) I(uliae) sunt, ei(ue) pon(t)ifi(c)es auguresque in pontificum augurum conlegio in ea colon(ia) sunt, ita uti qui optima lege optumo iure in quaque colon(ia) pontifices) augures sunt erunt. iisque pontificibus auguribusque, qui in quoque eorum collegio erunt, liberisque eorum militiae munerisque public(i) uacatio sacro sanctius esto uti pontifici Romano est erit, (a)e(r)aque militaria ei omnia merita sunt. de auspiciis quaeque ad eas res pertinebunt augurum iuris dictio iudicatio esto. eisque pontificib(us) auguribusque ludis, quot publice magistratus facient, et cum ei pontific(es) augures sacra publica c(oniae) G(enetiuae) I(uliae) facient, togas praetextas habendi ius potestasque) esto. eisque pontificib(us) augurib(us)que) ludos gladiatoresque) inter decuriones spectare ius potestasque esto.

LXVI. Whichever pontiffs and whichever augurs C. Caesar, or whoever shall have founded the colony at his command, shall have appointed from the colony, they are to be the pontiffs and they the augurs of the *colonia Genetiva Iulia*, and they are to be the pontiffs and the augurs in the college of pontiffs or augurs in that colony, in the same way as those who are or shall be pontiffs and augurs with the best conditions and the best status in any colony. And for those pontiffs and augurs, who shall be in each of their colleges, and for their children, there is to be exemption from military service and compulsory public service (prescribed) by what is sacred, as for a Roman pontiff, and their periods of military service are all to be credited to them. Concerning auspices and whatever things shall pertain to those matters, jurisdiction and right of judgment are to belong to the augurs. And those pontiffs and augurs at the games, whenever the magistrates shall give them publicly, and when those pontiffs and augurs shall perform the public sacrifices of the *colonia Genetiva Iulia*, are to have the right and power of wearing *togae praetextae*. And those pontiffs and augurs are to have the right and power to watch games and combats of gladiators among the decurions.

LXVII. Quicumque pontifices) quique augures c(oniae) G(enetiuae) I(uliae) post h(anc) l(egem) datam in conlegium pontific(um) augurumque) in demortui damnatiue loco h(ac) l(ege) lectus cooptatusue erit, is pontifex) augurque) in c(onia) Iul(ia) in conlegium pontifex augurque) esto, ita uti qui optima lege in quaque colon(ia) pontifices) auguresque) sunt erunt. neue quis quem in conlegium pontificum capita sublegito cooptato nisi tunc cum minus tribus pontificib(us) ex iis, qui c(oniae) G(enetiuae) sunt, erunt. neue quis quem in conlegium augurum sublegito cooptato nisi tunc cum minus tribus auguribus ex eis, qui colon(iae) G(enetiuae) I(uliae) sunt, erunt.

41 In González 1986: 198.

42 Cf. D'Ors 1986: 180 f., see Rüpke 1995: 542–546 for details.

43 Wissowa 1912: 79.

44 A fuller treatment of the topic under the perspective of 'urban religion and imperial expansion' will be published in the papers of the network 'Impact of Empire' (Lukas de Blois / Peter Funke).

LXVII. Whoever after the issuing of this statute shall have been chosen or co-opted according to this statute as pontiffs and augurs of the *colonia Genetiva Iulia* into the college of pontiffs and (the college) of augurs in the place of a man who has died or been condemned, he is to be pontiff or augur in the *colonia Iulia* in the college as pontiff or augur, in the same way as those who are or shall be pontiffs and augurs with the best conditions in any colony. Nor is anyone to receive or choose in replacement or co-opt into the college of pontiffs, except at a time when there shall be less than three pontiffs among those who are of the *colonia Genetiva*. Nor is anyone to choose in replacement or co-opt anyone into the college of augurs, except at a time when there shall be less than three augurs among those who are of the *colonia Genetiva Iulia*.

LXVII(1). Huiri prafectus)ue comitia pontific(um) augurumque), quos h(ac) l(ege) f(a)c(ere) oportebit, ita habeto, prodi(c)ito, ita uti Huir(um) creare facere sufficere h(ac) l(ege) o(oprtebit).

LXVIII. The duumvirs or prefect is so to hold and proclaim an assembly for pontiffs and augurs, whom it shall be appropriate to appoint according to this statute, in the same way as it shall be appropriate to elect or appoint or appoint in replacement a duumvir according to this statute (trans. Crawford).

At first glance, the text seems to be rather straight forward. Urso is given the appearance of a Roman town by transferring two of the most prestigious religious institutions of the city of Rome, the augurs and pontiffs as a granted right. The situation, however, is more complex. The *lex* is engaged in a discourse about religion and public religion that is structured by controversial stances.

First, it should be observed that for the founder(s) of the colony, the existence of augurs and pontiffs as colonial priesthoods is a matter hallowed by tradition and universal practice. The most visible symbolic honor, the seating and the dressing at games, is regulated as well as the most important personal consequences, the exemption from military and public services. The rest is given to a 'most-favored-nation clause', implying a global view on a widespread institution rather than the existence of 'general regulations on priesthoods in Roman colonies' as envisaged by Crawford.⁴⁵ In a comparison between different colonies (and even Rome), the local negation of certain privileges to their priests would not be acceptable.

Secondly, as regards tasks, Roman *pontifices* and *augures* were not only the most prestigious of public priesthoods, but also the most powerful. Making judgments concerning priestly conduct, the religious quality of land and the gods' property, and last but not least the sacral quality of time and – before the calendar reform in 45 BCE intercalation, the pontiffs held a central position within the diffuse network of religious authority. The position of the supreme pontiff, the *pontificatus maximus*, would develop into the most important and most visible religious function of the emperors.⁴⁶ The augurs, by their expertise on augury, were involved into every major political decision from the election of magistrates, through legislation to the battlefield.⁴⁷ What did these priests do at Urso? We learn nothing about the pontiffs. Supervision of cults and funds is given to the duumvirs and the aediles, the definition of days of festivals to the decurions. The specific sacral categories of *feriae* and *locus sacer* are nowhere hinted at and the question of *loca religiosa*, burial places, is basically left to the magistrates (73); perhaps the pontiffs had a stake in expiation, mentioned in passing in the same text.

An explicitly defined field of activity is given for the augurs: augury and the like. What, however, was 'the like'? And what sorts of augury existed in a colony? The copying of – or even parallelism to – the Roman *auguraculum* in the Roman colony of Bantia is, as far as we can see, unique;⁴⁸ it does not imply a politically relevant role comparable to Roman

45 Thus, however, Crawford 1996: 434 *ad loc.*

46 See Van Haepelen 2002.

47 See Linderski 1986; Rüpke 2005: 1441–55.

48 Torelli 1966 [1995]: 97–129.

augurs' participation in *obnuntiatio*.⁴⁹ There is no indication at all in the *lex Ursonensis* or fragments of other regulations, that the highly complex system of the Roman republican balance of senatorial groups and individuals was reproduced in colonial institutions outside of Rome. To sum up, we do not see what the priests did at all. At least it is certain, that they did not have any role within the functioning of the institutions described in the *lex coloniae*.

This is congruent, thirdly, with those modifications of Roman rules that we can observe. I leave aside the question whether a colonial augur could lose his office unlike – or like? – augurs at Rome.⁵⁰ It has to be remembered that even the lack of housing property in the town could lead to a removal within the first five years of office (91) – standards of aristocratic behavior and honor could not be presupposed for an elite *in statu nascendi*. Other differences are more decisive. At Rome, a complicated procedure was followed for the election of the candidates nominated (and later co-opted) by the college proper. Seventeen out of thirty-five tribes (*tribus*), that is, just a minority, were selected by lot in order to determine the succession of individuals to priesthoods.⁵¹ At Urso, that attempt to differentiate priests from magistrates and preserve religious authority as authority *sui generis* was not followed. *Pace* chapter 68, priests were selected in the same manner as magistrates. The second difference concerns the number: three instead of fifteen or sixteen members in each college. There is no attempt to reproduce original Roman practice,⁵² but instead there is a restriction of the college to the very minimum of what could be called a *collegium* at all. I doubt even the adoption of the Roman procedure of *nominatio* by the college: the position of the two (or even one) remaining members would not be strong enough to make a pre-selection of candidates socially acceptable.

Fourth, it may be observed that Chapters 66 to 68 regulate augurs and pontiffs, not priests. The generic term *sacerdotes* is never used in this text. The only instance of its application in chapter 91 concerns the public lists of decurions and *sacerdotes*. The implication must be spelled out: there might be other priesthoods at Urso, too. They are, however, neither decreed nor granted any privileges. If they had any, it would be due to their quality as decurions, for example. Compared to the number of public priesthoods at Rome, this list of two items only, pontiffs and augurs, is restrictive.

It is time to reach some preliminary conclusions. The analysis of the regulations concerning pontiffs and augurs (or augurs and pontiffs in chapter 91, thus excluding a ranking of both) does not reveal a miniaturized version of the actual status of Roman priesthoods during the late republic. These traditional colleges are not used positively as symbols of the colony's Romanness; rather, they are accepted as unavoidable remnants of tradition. The potential political implications of the office are restricted. With regard to the structure of public cult as developed in the other chapters, these colleges are not necessary. Against the backdrop of traditional Roman religious authority, the inclusion of the priesthoods held for life in the charter's chapters on religion does not mark an integration, but an explicit exclusion, a literal as well as metaphorical bracketing-off. The execution of public religion is given to annual *magistri*, appointed and controlled by the local council as regulated in chapter 128, or handled by the magistrates themselves.

49 See Linderski 1995; Burckhardt 1988; Libero 1992.

50 See Crawford 1996: 435 for a summary of the discussion (see above, n. 2, for bibliography) and a rather negative view concerning that possibility. I would prefer a more positive stance; the norms at Urso spell out a position that was controversial at Rome: the augur could lose his office.

51 See Cic. *Leg. agr.* 2.18.

52 Thus Mommsen 1875: 248 (99).

7 Ritual

Another topic must receive mention before turning to a final conclusion. What are the rituals envisaged for public religion at Urso? Prominence is given to games, circus and gladiators, and, especially, plays, *ludi scaenici*.⁵³ Apart from the generic *sacra*⁵⁴ only the chapter on the *magistri* adds further specifications, naming *ludi circenses*, *sacrificia pulvinariaque* (128). Circus games and <couches>, that is, the public display of statues and busts of the gods to whom a banquet is being presented,⁵⁵ are definitely spectacular, prominently visible rituals. The repeated framing of *sacrificia* by these two types (tablet e, col. 2, lines 17 and 20) suggests larger public animal sacrifices, also concluded by banquets.⁵⁶ Public religion at Urso is public, visible, and participatory religion.

8 Conclusion

The model of religion as adumbrated in the surviving clauses of the *lex Ursonensis* is characterized by a two-layered structure. Religion has a firm place within the socio-political fabric of the *colonia*. As public cult (*sacra publica*), it is financed and organized by the council and its magistrates – the financing of the cult is the leitmotif that holds together the whole passage on religion.⁵⁷ It is characterized by large public rituals. The concrete particulars of this religion is left to the local elite and its financial power. The imposition of the cult of the Capitoline triad and, to a lesser degree, Venus, presumably Genetrix, the only religious element fixed *a priori*, does not seem to have been designed to provide a focus for or island of Romanness within a foreign province. More probably, it ensures that any attempts of local magistrates to create a distinctive personal image for themselves must employ devices – *ludi Capitolini*, so to speak – symbolically related to the central government, to Rome.

On the contrary, the existence of a second layer of religion is implicitly or even negatively formulated. Priesthoods, expiation, burials and ancestor cult belong to this layer; associations might form further elements. This layer does not form an integral part of the political structure and public religion of the colony. It is by no means illegal, but it must not interfere with political activities. The regulations concerning pontiffs and augurs attempt to transfer a traditional element of the first layer to the second layer, acknowledging and isolating this time honored institution of public religion at Rome. At Urso, all priesthoods are subordinated to magisterial power. Chapter 72, dealing with private donations to temples, should not be read as an extension of public guarantees for the functioning of religion, but as a regulation that the religious activities at the borderline between public and private – that is, private donation to publicly defined cults – should be kept within a spatially circumscribed realm of religion (*in ea aede*). Resources legally accumulated under the umbrella of religion should not be used to interfere with the larger socio-political realm.

The *lex Ursonensis* does not offer evidence for an encompassing Roman *Sakralrecht*. Legal techniques are used to limit the possibilities of independent religious action, but without interfering with time-honored religious traditions. Just as Varro treats religion as

53 See chs. 70 f. 126 f.

54 Used in chs. 64 f. 69 and 72.

55 Briefly Rüpke 2001: 185.

56 See *ibid.*: 141–146, Scheid 1988 and Rüpke 2006.

57 See chs. 65, 69–72; it is important for 128, too.

part – and the second part – of the *Antiquitates Rerum Humanarum et Divinarum*, the *lex Ursonensis*, while not denying the deities their due, construes religion as social activity, subject to the priorities of public law.

Chapter 3

Magic, Religion, and Law: The Case of the *Lex Cornelia de sicariis et veneficiis*

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The Opinions of Paulus, a brief summary of Roman law attributed to the jurist Julius Paulus, includes in its exposition of the *lex Cornelia de sicariis et veneficiis* the following precepts (5. 23):

15: Those who have performed, or arranged for the performance of impious or nocturnal rites (*sacra impia nocturnave*), in order to enchant (*obcantarent*), transfix (*defigerent*), or bind (*obligarent*) someone, are either crucified or thrown to the beasts.

16: Those who have sacrificed a man or obtained omens from his blood (*hominem immolaverint exve eius sanguine litaverint*), or have polluted a shrine or a temple (*fanum templumve polluerint*), shall be thrown to the beasts or, if *honestiores*, be punished capitally.

17: It is agreed that those guilty of the magic art (*magicae artis conscios*) be inflicted with the supreme punishment, i. e., be thrown to the beasts or crucified. Actual magicians (*magi*), however, are burned alive.

18: No one is permitted to have in their possession books of the magic art (*libri artis magicae*); those in whose possession they are found have their property confiscated and their books publicly burnt, and they themselves are deported to an island; *humiliores* are punished capitally. Not only is the profession of this art, but also the knowledge (*scientia*) prohibited.

This passage has long served as a key proof-text for the Roman criminalization of magic; indeed, it is one of the very few Roman legal texts that actually uses the terms *ars magica* and *magi*. Although it does not go so far as to define these terms, at least in those sentences where they actually occur, we can reasonably infer something of their significance from the first two sentences quoted here, which seem to be closely related.

Two characteristics stand out. The first is a concern with actions that are harmful to other people or, more precisely, are intended to give one person power over another; this is particularly clear in sentence 15, where the subordinate clause specifies actions meant to <fix> or <bind> someone. It is much less clear in the following sentence, however: although sacrificing someone undoubtedly harms that person, that is presumably not the primary purpose of the rite, which is left unspecified. Consequently, the second salient characteristic seems even more important. This is a concern not so much with intent as with a particular class of actions that are defined by the use of cult vocabulary (*sacra*, *immolare*, *litare*, *fanum*, *templum*). But these cult acts are deviant: the *sacra* are *impia* and take place at night (a practice of which Roman authorities always took a dim view); the rites of *immolatio* and *litatio* are performed barbarously on a human victim; the shrines and temples are polluted.¹ Thus, if we can take the first two sentences of this excerpt as a

¹ For concern with nocturnal rituals, see e. g. Livy 39. 14 with ILS 18.15 (*the SC de Bacchanali-*

guide to what the author meant in sentences 17 and 18 by the *ars magica*, we may conclude that <magic> here denotes deviant religious acts.

The passage is thus excellent evidence for the use of law to police religious behavior. Many recent critics have argued that the term <magic> is nothing more than a way of marking off certain rituals and religious traditions as unacceptable to the person employing the term.² The criminalization of <magic>, then, was a tool that those in power could use to define and enforce the limits of acceptable religious behavior. It was of course only one tool in an extensive and varied kit, of which other components are discussed elsewhere in this volume. As I have proposed in an earlier paper, however, the condemnation of <magic> constituted a particularly supple and useful tool, for the precise reason that we see in this passage from *The Opinions of Paulus*: <magic> was rarely defined and was perhaps even incapable of exact definition. Consequently, what counted as <magic> and therefore liable to condemnation was something subject to negotiation on an almost case-by-case basis. Trials for magic could thus serve as a context for forging a consensus about acceptable and unacceptable religious behavior among the various elements of the empire.³

The *lex Cornelia* is often said to be the basis for the Roman law on magic, and the passage of *The Opinions of Paulus* quoted above suggests that this is a reasonable view; it is a view, indeed, that I myself have held.⁴ Yet there are problems. To begin with, most scholars now agree that *The Opinions of Paulus* dates to the end of the third century CE, whereas the original *lex Cornelia* dates to the late 80s BCE. The fact that nearly four centuries lie between is significant. As is widely recognized, Roman law was not a static system, but was instead undergoing constant development, reflecting changing social conditions and shifting cultural categories. We therefore cannot without considerable caution use a late text like this as evidence for the legal situation in earlier times.⁵ Secondly, the very term <magic> constitutes a major methodological problem. It is difficult, because of widespread popular notions about <magic>, to resist the assumption that what the *lex Cornelia* criminalized was conceived from the start as a particular type of <magic>, and that for this reason it came quickly and readily to apply to other types of <magic> as well. In fact, what the *lex Cornelia* criminalized was very specific: the handling of *venena mala* for the purpose of killing a person. By characterizing it without more ado as <magic>, we slip into the logical fallacy of assuming what we should be attempting to demonstrate, namely, that the *lex Cornelia* was the basis for the Roman law on magic.

In the present paper I attempt a more cautious analysis of the evidence, sticking as closely as possible to the known terms of the original law in order to trace developments in its interpretation. I thus look first at *veneficium* in the strict sense, i. e., the use of *venena*, and then at the application of the law to the analogous performance of noxious rituals. In the last section I examine the association of the law with *magi* and the *ars magica*. I hope

bus), Cic. Leg. 2. 35–6, Apul. Apol. 57–8, Cod. Theod. 8.16.7 (Valentinian and Valens, 364 CE); nocturnal rituals were often equated with clandestine rituals, on which see Kippenberg 1997: 150–7. On the cultural meaning of human sacrifice, see Rives 1995.

2 See especially Phillips 1986: 2711–32, 1991, and 1994; cf. Aune 1980. It has become the received view in much current scholarship on ancient magic, e. g., Gager 1992: 24–5, Beard, North and Price 1998: 154, Janowitz 2001: 26, Dickie 2001: 21.

3 See Rives 2003.

4 Rives 2003: 327 and 334; this idea was suggested already by Mommsen 1899: 640–1, and was given succinct expression by Pharr: <This law formed the basis of much of the imperial legislation against magic> (1932: 279). Cf. more recently Graf 1997: 46, Liebs 1997: 146, Beard, North and Price 1998: 233, Dickie 2001: 151.

5 See my earlier paper (Rives 2003: 328–34) for a more detailed discussion of this text and for conjectures about the origins of the precepts on *magi* and the *ars magica*.

to demonstrate that interpretation of the *lex Cornelia* developed only gradually and along relatively restricted lines, and that its role in the control of deviant religious behavior may have been much less significant than this passage from *The Opinions of Paulus* suggests.

1 The disputed definition of *veneficium*

The text of the original *lex Cornelia de sicariis et veneficiis* is lost, but can be partially reconstructed from later citations and allusions. As far as we can make out, the clause of the law that dealt with *veneficium* criminalized the preparation, sale, purchase or possession of *venena mala* for the sake of killing someone.⁶ We should note that the law defines this crime through the very specific combination of a particular action (the use of *venena mala*) with a particular intent (to kill). Although the issue of intent requires no commentary, it is necessary to say something about the meaning of *venena mala*. A *venenum* was a substance that could bring about a change in something else, especially a human being; the word is difficult to translate into English, since it could denote substances that we would distinguish as <poisons>, <potions>, and <drugs>. A *venenum malum* was thus a substance that brought about a negative or undesired change.

As far as we can tell, the application of the *lex Cornelia* was at first limited to cases of what we would call poisoning, i. e., the use of some substance to kill someone. The only trials known to have taken place under the law in the republican period are those connected with A. Cluentius Habitus, known from Cicero's speech *Pro Cluentio*, delivered in 66 BCE, and these clearly concerned poisoning.⁷ In the imperial period, however, there were debates over the purview of the law. These often turned on the question of which term in the original law was more important: the use of *venena mala* or the intent to cause death? Two of the *Minor Declamations* attributed to Quintilian present this issue very clearly through a pair of contrasting cases. In the first, a woman gives a sleeping potion to her stepson when war is threatening, with the result that he is charged with desertion; he is acquitted, and then accuses his stepmother of *veneficium*. The defense, emphasizing the second term of the law, argues that the sleeping potion was not a *venenum* because it did not kill the stepson and is not deadly; the prosecution, emphasizing the first term, argues that it is indeed a *venenum*, because it is a drug and brings about an effect contrary to nature.⁸ In the other case, a woman gives cold water to her gravely ill stepson after learning from the doctors that this would surely be fatal for him; the boy dies, and her husband accuses her of *veneficium*. The defense argues that although there was an intent to kill, thereby conceding the second term of the law, there is nevertheless no basis for a charge of *veneficium* because cold water is not a *venenum*, thus basing their claim on the first term.⁹ Although

6 I follow the reconstruction of J.-L. Ferrary (in Crawford 1996: 752): <de eius capita quaerito> qui hominis necandi causa venenum malum fecit fecerit <vendidit> vendiderit <emittit> emerit <habuit> habuerit <dedit> dederit; see further Ferrary 1991.

7 See especially 55 and 147–8; there is perhaps also Caelius' accusation that Calpurnius Bestia murdered his wives with aconite: Plin. NH 27.4. On the trial of Nigidius Figulus, see section three below. We may further note that whenever the terms *venenum*, *veneficium*, or *veneficus/a* appear in republican texts in a legal context, they always refer strictly to poisons: Rhet. Her. 2.8 and 44, 3.33, 4.23; Cic. Inv. 2.58, Rosc. Am. 90, Cluent. 1–2 and 166, de Oral. 2.105.

8 Decl. Min. 246; note especially 246.3 (sermo). Quare negat venenum esse qui pro rea dicit? Quia non occiderit neque sit mortiferum. Quare dicit venenum esse qui accusat? Quoniam medicamentum sit et efficiat aliquid contra naturam.

9 Decl. Min. 350; note especially 350.1: Nam et datam a se potionem non negat et eam periculosam fuisse quae praedicta sunt ostendunt, and 350.2: Negat enim se teneri posse veneficii, quoniam non dedit venenum.

these specific scenarios might be somewhat far-fetched, the legal/rhetorical issues they investigate are not: the evidence suggests that in the first and second centuries CE it was not uncommon to debate whether the emphasis should be on the administration of *venena mala* or instead the intent to cause death.¹⁰

If the use of *venena mala* was regarded as the crucial element in the legal definition of *veneficium*, it then became necessary to consider what did or did not fall into that category. The word *venenum* could be applied to substances used not only to kill, although that was the most common connotation, but also to cause forgetfulness or sleep; similarly, substances that resulted in not only death but also love, aversion, impotence, or madness could all be described as *veneficia*.¹¹ Theoretically, *venenum* could even denote a medicine or curative; it was for this reason, or so at least instructors in jurisprudence taught, that the *lex Cornelia* specified *venenum malum*.¹² But of the various effects that a *venenum* could produce, which ones properly rendered it *malum*? The Alexandrian philosopher Philo held that those who used *pharmaka* to cause long-term illness and mental afflictions should be just as liable to legal retribution as those who used them to kill (*Spec. Leg.* 3. 98–9). Philo was commenting on Mosaic rather than Roman law, but there was apparently nothing peculiarly Jewish about his opinion on this matter. Quintilian, at any rate, implies that one could reasonably argue in a Roman court that the term *veneficus* should apply to a person who destroys a mind as well as one who destroys a life.¹³ But how far could people take this line of argument? What, for example, of *venena* that acted to inspire love (which the ancients in fact often regarded as close to madness)? Although these had their own peculiar name, *amatoria*, they might nevertheless be classed as a type of *venenum*. The evidence of Quintilian suggests that in his day debates over whether or not an *amatorium* counted as a *venenum* were not at all unusual.¹⁴

- 10 The *Declamationes Minores* are probably contemporary with Quintilian or somewhat later, and seem to reflect the practice of his school: see Winterbottom 1984: xiv–xvi. Because they were used to teach students to isolate the key issues of a case according to the *stasis* system, they necessarily dealt with genuine issues, even if in hypothetical form.
- 11 Forgetfulness: Cic. *Orat.* 129 (cf. *Brut.* 217); sleep: Apul. *Met.* 7.12, 8. 11 and 10.11; love: Plin. *NH* 8.165 and 9.79; aversion: Ov. *Rem.* 249–51 and 290; impotence: Petr. 128.2; madness: Tac. *Ann.* 4.22.3. It is best not to insist on too sharp a distinction between *venenum* and *veneficium*: Cicero uses the two terms interchangeably in describing the same incident, and even the *lex Cornelia* itself defines *veneficium* by means of *venenum malum*.
- 12 Marcian, *Institutes* 14 (quoted below, n. 19). Cf. Gaius, à propos the XII Tables (D. 50.16.236. pr.): *Qui venenum dicit, adicere debet, utrum malum an bonum; nam et medicamenta venena sunt, quia eo nomine omne continetur, quod adhibitum naturam eius, cui adhibitum esset, mutat. Cum id quod nos venenum appellamus, Graeci pharmakon dicunt, apud illos quoque tam medicamenta quam quae nocent, hoc nomine continentur: unde adiectione alterius nomine distinctio fit.* See further Serv. *Georg.* 1.129 and *Aen.* 11.458.
- 13 *Inst.* 9.2.105: Celsus, another writer on rhetoric, included among *figurae* what he calls *rerum duarum cognatio, quod est, ut idem valeant quae videntur esse diversa, ut non is demum sit veneficus, qui vitam abstulit data potione, sed etiam qui mentem*; Quintilian himself considers this as instead an issue of *finitio* or definition (see the following note), but seems to regard the argument itself as valid. Cf. the similar argument presented in *Decl. Mai.* 14–15, where the case is that of a young man whose mistress gives him a potion to inspire hate; he stops loving her, and then accuses her of *veneficium*. The prosecution argues as follows: *venenum negat esse nisi tantum quod occidit. Quid refert, animo noceat aliquis an membris* (14. 5–6)?
- 14 Quintilian on several occasions uses this question to illustrate the issue of definition, e. g., *Inst.* 1.3.10: *Interim quaeritur in rebus specie diversis, an et hoc et hoc eodem modo sit appellandum, cum res utraque habet suum nomen, ut amatorium, venenum*; see also *Inst.* 1.3.30, 7.8.2 and 8.5.31 (quoted below in n. 16), and cf. Marcian in n. 19 below. Note also *Decl. Min.* 385.4, where an allegation of administering an *amatorium* is for strategic purposes equated with a charge of *veneficium*. Similarly, Dickie (2001: 146) suggests that Pliny's use of the word *crimina*

Nevertheless, the majority of cases for which we have any information continued to deal with *venena* that caused death, and arguments that there was no *veneficium* in the absence of a corpse seem to have carried weight.¹⁵ Quintilian, at any rate, provides the following as an example of a *sententia*: *«Do you want to be certain that the amatorium was a venenum? The fellow would be alive, if he had not drunk it!»*¹⁶ Yet even if intent to kill was taken to be the crucial element in the legal definition of *veneficium*, there could still be arguments to extend the purview of the law to cases in which a *venenum* was the indirect cause of death, as in the case of the sleeping draught mentioned above. Quintilian presents the following hypothetical case: *«Assume a law «a venefica is to suffer capital punishment.» A wife gave an amatorium to her husband, who used to beat her regularly; she also divorced him. When asked by his relatives to return, she did not. The husband hung himself; the woman is charged with veneficium. The strongest line for the defense is that an amatorium is a venenum: that will be an issue of definition. If this is not sufficiently effective, employ a syllogism, to which we shall proceed after virtually abandoning our earlier argument: should she not be punished just as if she had killed her husband with a venenum?»*¹⁷

We should note that the hypothetical law that Quintilian posits for his example is virtually identical with the actual *lex Cornelia*, and that the arguments he outlines here could well have been used in actual trials. For example, in the year 24 CE, the praetor Plautius Silvanus, *«for reasons unknown»*, threw his wife out of the window. When questioned by the emperor, he replied incoherently that he had been asleep and knew nothing about it; Tiberius himself investigated the scene of the crime, and found clear evidence of a struggle. Thereafter, Silvanus' grandmother sent him a dagger as a sign that he should forestall the inevitable trial through suicide, which he did. Shortly after his death, his former wife Numantina was accused of having driven him insane by means of *carmina* and *veneficia*, but was acquitted. It is likely enough that Numantina was tried under the *lex Cornelia*, and it is easy to imagine the prosecution arguing, just as in Quintilian's hypothetical case, that what she had done was tantamount to killing her former husband by *veneficium*.¹⁸

The jurist Aelius Marcianus, in the large-scale textbook that he composed probably in the 220s or 230s CE, sought to circumvent all these rhetorical strategies by presenting a very clear-cut interpretation of the law. He first concedes that the term *venenum* is ambiguous and can denote a wide range of substances, including *amatoria*; he also notes that the law can apply equally to substances described as *medicamenta*. But he then makes it clear that all this is in an important sense beside the point, because the law deals solely and specifically with *«that which is possessed for the sake of killing a person»*. In this way he insists on the primacy of the second term of the law, namely, the intent to cause death.¹⁹

in speaking of a fish allegedly useful in love potions and in causing court delays (*NH* 9.79) suggests that its use could lead to criminal charges; whether these would be accepted is another question.

- 15 We have evidence for only a few trials of imperial date on charges of *veneficium*, but they all involve deaths: Plin. *Ep.* 1.6. 8–13, Papinian *ap. Dig.* 48.1.14, Modestinus *ap. Dig.* 49.14.9.
- 16 *Inst.* 8.5.31: *Vis scire, venenum esse amatorium? Viveret homo, nisi illud bibisset.* Note also the argument for the defense in *Decl. Mai.* 15.4 (the case is described above, n. 12): *Veneficii agit. Ecquando umquam, indices, audistis de veneficio vivum quaerentem? Facinus hoc semper ex mortibus accepit invidiam ... Veneficium si arguas, oportet ostendas putre livoribus cadaver.*
- 17 *Inst.* 7.8.2. The late rhetorical writer Julius Victor cites this as an example of *«two – fold definition»*, in *qua non de duobus nominibus quaeritur, sed cum ei rei, quae proprium nomen obtinet, aliud extrinsecus nomen adhibetur* since *hic constat potionem illam amatorium vocari: an tamen et veneficii nomen accipere debeat, quaeritur* (*Ars rhetorica* 3. 3, p. 378 Halm).
- 18 Tac. *Ann.* 4.22; see further Dickie 2001: 146–7.
- 19 Marcian, *Institutes* 14 (*Dig.* 48.8.3.2): *Eiusdem legis poena adficitur, qui in publicum mala*

His interpretation thus seems to combine a strict reading of the law with an acknowledgement of the renewed emphasis on malicious intent that he attributes to Hadrian.²⁰

At the same time, however, Marcian cites two *senatus consulta* that, while continuing to restrict the purview of the law to the handling of deadly substances, nevertheless shift the focus away from intent. Both of them deal with what we would now call malpractice. The first penalizes the administration of fertility drugs that result in the death of women who takes them; although Marcian does not explicitly state that this *senatus consultum* invoked the *lex Cornelia*, he himself clearly thought that it was connected. Presumably following the wording of the actual decree, he notes that even though the woman who administered the drug may not have acted with malicious intent, her action should still be punished because it involves a bad precedent.²¹ The second *senatus consultum* makes punishable under the *lex Cornelia pigmentarii* who «rashly dispense» dangerous drugs. This ruling was presumably intended to expand on or clarify the idea of what it meant to possess *venena* for the sake of killing a person, since the drugs it specifies were regarded as poisons, although they all had medicinal uses as well.²² It was thus apparently a way of bringing the *lex Cornelia* to bear upon those who supplied the means of death not necessarily with malicious intent but simply without taking the necessary precautions.²³

medicamenta vendiderit vel hominis necandi causa habuerit. Adiectio autem ista veneni mali ostendit esse quaedam et non mala venena. Ergo nomen medium est et tam id, quod ad sanandum, quam id, quod ad occidendum paratum est, continet, sed et id quod amatorum appellatur: sed hoc solum notatur in ea lege, quod hominis necandi causa habet.

20 Marcian, *Institutes* 14 (Dig. 48.8.1.3): *Divus Hadrianus rescripsit eum, qui hominem occidit, si non occidendi animo hoc admisit, absolui posse, et qui hominem non occidit, sed vulneravit, ut occidat, pro homicida dammandum*; Ulpian quotes the same ruling in almost the same language in *De officio proconsulis* 1 (Coll. 1.6.2); cf. also Callistratus, *De cognitionibus* 6 (Dig. 48.8.14): *Divus Hadrianus in haec verba rescripsit: «in maleficiis voluntas spectatur, non exitus»*. It is presumably in this light that we should understand Paulus' statement that *in lege Cornelia dolus pro facto accipitur; neque in hac lege culpa lata pro dolo accipitur* (*De publicis iudiciis*, Dig. 48.8.7).

21 Marcian, *Institutes* 14 (Dig. 48.8.3.2): *Sed ex senatus consulto relegari iussa est ea, quae non quidem malo animo, sed malo exemplo medicamentum ad conceptionem dedit, ex quo ea quae acceperat decesserit.*

22 Marcian, *Institutes* 14 (Dig. 48.8.3.3): *Alio senatus consulto effectum est, ut pigmentarii, si cui temere cicutam salamandram aconitum pituocampas [aut] bubrostim mandragoram et id, quod lustramenti causa dederit cantharidas, poena teneantur huius legis*. For the last part, which is apparently corrupt, Mommsen ad loc. suggests *mandragoram, praeterquam lustramenti causa, cantharidas dederint*. The problem is bound up with the meaning of *lustramentum*, a very rare word. Souter (1949, s. v.) suggests that it means «stimulant to sensual pleasure», but is clearly simply inferring this from the context; *lustrum* and its derivatives instead normally refer to rituals of purification. *Cicuta* is hemlock, well known as a poison but also used as a cure for biliousness (Hor. *Ep.* 2.1.53, Pers. 5.145). *Salamandra* is the salamander, said to be a very venomous animal but also useful as an aphrodisiac (Plin. *NH* 29.74–6); Pliny associates it with *cantharides*, *buprestis* and *pityocampae* in a list of poisons (*NH* 23.62, 28.128). *Aconitum* is monkshood, another well known poison, but one that could also be used as an antidote to the sting of a scorpion (Plin. *NH* 27.4–10). *Pityocampa* was a kind of caterpillar (*NH* 23.62), and *bubrostis* was presumably *buprestis*, a poisonous beetle (*NH* 30.30); both, along with the *cantharis*, were used medicinally to cauterize flesh and form scabs (*NH* 29.95). *Mandragoras* was mandrake, used as a soporific (Cels. 3.18.12, Apul. *Met.* 10.11). *Cantharis* was the blister-beetle or Spanish fly, a poison if drunk but with beneficial external uses (*NH* 29.93–5).

23 Galen reports a case that seems to reflect this exact issue (*On Antecedent Causes* 14.183 = Hankinson 1998: 140–1): a doctor supplied a *farmacum deliterium* that a woman then used to murder her stepson. Not only was the woman herself condemned, but also the doctor, the slave who bought the drug, and the slave who administered it.

These two *senatus consulta* mark the beginning of a new development in the interpretation of the *lex Cornelia*. Since at least the time of Augustus, legal opinion had held that someone who inadvertently killed someone through the improper use of drugs was liable for damages under civil law.²⁴ But the senatorial decrees cited by Marcian effectively brought this sort of malpractice into the realm of criminal law by making it liable under the *lex Cornelia*. In neither case does Marcian provide any indication of date, so that all we can say with certainty is that they were earlier than c. 220 CE, although the fact that he cites a *senatus consultum* rather than an imperial *oratio* may possibly make it more likely that they are earlier than the reign of Marcus Aurelius.²⁵ At any rate, they suggest that the focus of concern was shifting away from the issue of intent to the mere use of *venena*.

This is undoubtedly the situation at the end of the third century CE, as the *Opinions of Paulus* attests. The two clauses that frame the passage quoted at the start of this paper make this quite clear. One of these simply summarizes the principle that underlies the *senatus consulta* cited by Marcian: «if a person has died from a medicine (*medicamen*) given for human health or recovery (*ad salutem hominis vel ad remedium*), the one who gave it, if an *honestior*, is relegated to an island; a *humilior*, however, is «punished capitally» (*PS* 5.23.19). The other is very different: «those who give abortifacients or love potions (*abortionis aut amatorum poculum*), even if they do not act with malicious intent (*dolo*), nevertheless, because it involves a bad precedent (*mali exempli res est*): *humiliores* are relegated to the mines, *honestiores* to an island, with partial forfeiture of their property; but if as a result a woman or a man has died, they suffer the supreme punishment» (*PS* 5.23.14). This effectively reverses the principle that Marcian tried to uphold, that *amatoria*, even if they can properly be classed as *venena*, nevertheless do not fall under the purview of the *lex Cornelia*. It also brings the use of abortifacients under the law, which had in earlier generations been treated separately.²⁶ More importantly, the main concern is no longer with deadly drugs; although the death of the subject aggravates the punishment, the use of abortifacients and love-potions is punishable in and of itself.²⁷ The main issue seems instead to be the same as that in the first of the *senatus consulta* cited by Marcian, that of

24 Ulpian cites both Antistius Labeo and Juventius Celsus for the opinion that a person who administers a poison (*venenum*) in place of a *medicamentum* is liable under the *lex Aquilia* of damages, and that one who merely supplies the drug is liable to an action *in factum* (Ulpian, *Ad edictum* 18, ap. Dig. 9.2.9. praef. and 9.2.7.6); Labeo's opinion dealt specifically with midwives. It is interesting to note that Labeo also thought that the use of drugs to cause madness was liable to an *actio iniuriarum* (Ulpian, *Ad edictum* 77, Dig. 47.10.15. praef.).

25 Talbert's collection of dated *senatus consulta* and *orationes* (1984: 438–50) suggests that jurists were more likely to cite the latter for laws starting with the reign of Marcus Aurelius; yet later *senatus consulta* are also attested, and the large number of undated *senatus consulta* known only from third-century jurists (Talbert 1984: 455–8) makes it risky to place much weight on this argument.

26 The use of abortifacients had long been liable to criminal charges. Cicero (*Cluent.* 32) cites a case in which the proconsul of Asia had condemned a woman of Miletus for using drugs to induce an abortion, although the earliest known imperial legislation on the topic is a rescript of Septimius Severus and Caracalla (Marcian, *Regulae* 1, Dig. 47.11.4); cf. Tryphoninus, *Disputationes* 10, Dig. 48.19.39, and Ulpian, *Ad edictum* 33, Dig. 48.8.8). Although the editors of the Digest put the last of these notices under the rubric of the *lex Cornelia*, there is no indication that Ulpian himself made this connection; the fact that they placed Marcian's citation of the Severan rescript under the rubric *de extraordinariis criminibus* suggests that the association with the *lex Cornelia* was a later development.

27 We may note that there is never any suggestion that a fetus could be regarded as a *homo*, and that abortifacients could accordingly be brought under the *lex Cornelia* as *venena* held *hominis necandi causa*.

«bad precedent». The precise nature of this «bad precedent» is not clear, but there is a clear suggestion that any use of *venena* in matters concerning sexuality has become inherently suspect.²⁸ In short, we find in *The Opinions of Paulus* at the end of the third century CE an interpretation substantially different from that advocated by Marcian towards its beginning.

2 *Carmina, devotiones* and *mala sacrificia*

We have seen that interpretation of the *lex Cornelia* tended until a relatively late period to limit its purview to the handling of *venena mala* «for the sake of killing a person», as the original statute specified. Although advocates might argue that the use of *venena* for other purposes should also be liable under this law, there is little evidence that their arguments gained much acceptance. In sharp contrast to this conservatism with respect to intent, however, interpretation regarding means apparently developed fairly rapidly to cover the use of verbal formulae and ritual actions, usually described as *carmina* and *devotiones*, as well as *venena mala*. It was as a result of this development that issues of religious deviance came gradually to fall under the *lex Cornelia*.

Although an association of *carmina* and *venena* probably goes back to a very early period, the earliest direct evidence for it comes from an anecdote that Cicero liked to tell about the elder C. Scribonius Curio, who died in 53 BCE.²⁹ His memory was notoriously weak, asserts Cicero, so much so that in one trial, when Cicero was representing a woman named Titinia and Curio represented the opposing party, he completely forgot his argument; to cover his embarrassment, he attributed his mental lapse to the *veneficia* and *cantiones* of Titinia.³⁰ What did Curio mean by the word *cantio*, and why did he link it with *veneficia*? The noun derives from the verb *cantare*, itself an intensive form of the verb *canere*, which from an early date seems to have had particular reference to verbal formulae thought to cause a change in something. The elder Cato, for example, gives instructions «to chant» (*cantare*) a set of nonsense words, which he describes as a *cantio*, as part of a procedure for healing a sprain.³¹ Similarly, Lucilius used the cognate noun *cantus* in

28 This treatment of *amatoria* seems to anticipate that of Constantine, who in a rescript of the year 318 (*Cod. Theod.* 9.16.3 = *Cod. Just.* 9.18.4) declared that «the knowledge of those who, equipped with the magic arts (*magicis adincti artibus*), are revealed either to have worked against the well-being of men or to have turned chaste minds towards lust (*pudicos ad libidinem deflexisse animos*), is to be punished and deservedly avenged by the harshest laws».

29 I have argued in an earlier paper that the XII Tables probably associated *carmina* and *venena* as two comparable means of transferring agricultural fertility from another person's field to one's own: Rives 2002: 273–9. I have been unable, however, to identify any specific juxtaposition of the two terms prior to Cicero's anecdote about Curio, despite a range of evidence about the powers of *venena* and *carmina* taken separately. The juxtaposition becomes common in the Augustan poets' descriptions of witchcraft (e. g., Verg. *Ecl.* 8.94–6, Hor. *Sat.* 1.8.19, Tib. 1.8.17–23, Ov. *Am.* 3.7.28 and *Rem.* 290), and is frequent thereafter.

30 *Brut.* 217: *Memoria autem ita fuit nulla, ut aliquotiens, tria cum proposuisset, autem quantum adderet aut tertium quaereret; qui in iudicio privato vel maximo, cum ego pro Titinia Cottae peroravisset, ille contra me pro Ser. Naevio diceret, subito totam causam oblitus est idque veneficiis et cantionibus Titinae factum esse dicebat.* He refers to the story again at *Orat.* 129: *Nobis privata in causa magna et gravi cum coepisset Curio pater respondere, subito assedit, cum sibi venenis ereptam memoriam diceret.*

31 *Agr.* 160: *Luxum siquod est, hac cantione sanum fiet. Harundinem prende tibi viridem P. IIII aut quinque longam, mediam diffinde, et duo homines tenant ad coxendices. Incipe cantare: motas vaeta daries dardares astataries dissunapiter, usque dum coeant. Et tamen cotidie cantato et luxato vel hoc modo: «huat haut haut istasis tarsis ardannabou dannaustra».* Cf. Varro *Rust.* 1.2.27 and *Men.* 151.

referring to the popular belief that the Marsi were able to destroy snakes by chanting (576). Long before this, the XII Tables had employed two compounds of *cantare* to describe certain proscribed activities: *fruges excantare*, «to chant out crops», was the use of verbal formulae to transfer agricultural fertility from another person's fields to one's own, and *malum carmen incantare*, «to chant a bad chant against», was use of verbal formulae to bring about some negative change in a person.³² Against this background, it is easy to understand Curio's allegations about Titinia: verbal formulae of a certain type were thought, like *venena*, to be capable of having an effect on external objects, such as causing forgetfulness in a speaker, and so it was reasonable enough for Curio to attribute his lapse to both of them equally.

Although it is striking that this evidence comes from the context of a trial, Curio's assertions about Titinia seem to have been an off-the-cuff response to an unexpected difficulty rather than part of the formal charges, whatever they were (the case is otherwise unknown). Moreover, the tradition of verbal formulae that Curio apparently invoked had little connection to cult practices, even though the simple verb *canere* was used from a very early date of hymns and supplications to the gods.³³ On both counts, the first case of *veneficium* in which allegations about *carmina* and *devotiones* play a significant role presents a striking contrast.

One of the most celebrated cases of the early empire is the death of Germanicus and the subsequent trial of Cn. Calpurnius Piso. Tiberius appointed Piso governor of Syria in 17 CE, at the same time as he made his nephew and adopted son Germanicus a kind of commander-in-chief of the eastern provinces. The relationship between the two men deteriorated steadily, to the point that when Germanicus fell ill in 19 CE, he came to believe that Piso had poisoned him. According to Tacitus, «the conviction that he had been given *venenum* by Piso increased the terrible force of the disease; and there were found in the floor and the walls the disinterred remains of human bodies, *carmina* and *devotiones* and the name of Germanicus inscribed on lead tablets, ashes half-burned and smeared with gore, and other noxious things (*malefica*) by means of which it is thought spirits are consecrated to the powers of the underworld (*numinibus infernis sacrari*)» (*Ann.* 2.69.3); once Germanicus realized that he was being destroyed by *veneficia*, he wrote to Piso to break off relations (*Ann.* 2.70). Dio provides a similar account of the gruesome discoveries in the house, and Suetonius claims more generally that Germanicus did not decide to break completely with Piso until «he had discovered that he was being assaulted by *veneficia* and *devotiones*».³⁴

Before he died, Germanicus urged his friends to avenge him. The first thing they did was to display his body nude on the pyre before it was cremated; according to Suetonius and Dio, it displayed all the signs of death by *venenum*, although Tacitus is much more non-committal.³⁵ They then began to make preparations to accuse Piso; according to

32 VIII. 1 and 4 in Crawford 1996: 677–9 and 682–4; for the interpretations offered here, see Rives 2002, esp. 273–9 and 282–3.

33 For example, in the *Carmen Saliare*, ap. Varr. *Ling.* 7.27: *divum em pa cante, divum deo supplicate*, i. e. *deorum in patrem canite, deorum deum supplicate*.

34 *Calig.* 3.3; cf. Dio 57.18.9: «Human bones that had been buried in the house where he was living and lead sheets bearing curses with his name were found while he was still alive.» For discussion, see Tupet 1980.

35 Suet. *Calig.* 1.2: *nam praeter livores, qui toto corpore erant, et spumas, quae per os fluebant, cremati quoque cor inter ossa incorruptum repertum est, cuius ea natura existimatur, ut tinctum veneno igne confici nequeat.* Dio (57.18.9) says more generally that «his body, carried into the agora and displayed to the public, revealed that he had been killed by *pharmakon*». Contrast Tac. *Ann.* 2.73.4: *corpus antequam cremaretur nudatum in foro Antiochensium ... praetuleritne ve-*

Tacitus, Piso himself fully expected them to call him before the *praetor qui de veneficiis quaereret* (Ann. 2.79.1). Germanicus' friends sent on to Rome a woman named Martina who was 'notorious in that province for her *veneficia*' (Ann. 1.74.2); she never reached her destination, however, but was rumored to have died suddenly at Brundisium 'with *venenum* hidden in the knot of her hair' (Ann. 3.7.2). Nevertheless, Germanicus' friends brought Piso to trial before the Senate, on charges that apparently involved both *maiestas* and *veneficium*. According to Tacitus, they claimed that 'through hatred of Germanicus and a keenness for sedition Piso had corrupted and seduced the troops, attacked Germanicus' friends and comrades, and finally killed Germanicus himself by means of *devotiones* and *venenum*' (Ann. 3.13.2); hence the *sacra et immolationes nefandae* performed by Piso and his wife, his armed assault on the state, and his own defeat in battle.

Among Piso's prosecutors was P. Vitellius, who Tacitus says spoke 'with great eloquence'. His speech survived at least to the time of the elder Pliny, who reports that one of the arguments Vitellius used to support his accusation of *veneficium* was the fact that Germanicus' heart did not burn when his body was cremated.³⁶ According to Tacitus, however, the case for *veneficium* was weak, and Piso was able to refute it. The key allegation was that Piso had sat above Germanicus at a banquet and had thus tainted his food, a charge that Tacitus describes as 'ridiculous' (Ann. 3.14.1–2). The charges concerning treason and sedition had more force, however, and Piso soon brought the proceedings to an end by committing suicide. The decree condemning Piso that the Senate issued after his death tends to support Tacitus' account as regards to *veneficium*: although it acknowledges that Germanicus himself held Piso responsible for his death, it makes no other reference to the charge.³⁷ Nevertheless, that became the standard story, to the point that Josephus, the earliest extant author to refer to the episode, can simply say that Germanicus 'was killed by Piso with a *pharmakon*, as others have related' (AJ 18.54).

We should at this point pause and consider in more detail the precise nature of the allegations that Germanicus' friends made against Piso. The key term is *devotio*, which both Tacitus and Suetonius use in conjunction with *venenum* or *veneficium* and which may well have been used in the actual trial.³⁸ The noun *devotio* is formed from the verb *devovere*, itself a derivative of *vovere*, 'to promise an offering to a gods in return for the fulfillment of a request'; the prefix *de-* may mean simply 'apart' (as in *dedicare*) or possibly 'down', with specific reference to the gods of the underworld. At an early date *devotio* and its cognates became technical terms for a particular type of ritual in which a Roman general dedicated the enemy, and in some cases himself, to the gods of the underworld in exchange for a Roman victory.³⁹ By the first century BCE, they had come to

neficii signa, parum constitit. These stereotyped *signa* were apparently often presented as evidence of *veneficium*: Ad Her. 2.8 and 2.44; Sen. Contr. 6.6 and 9.5; Quint. Inst. 2.21.19, 4.2.54, 5.9.11, 5.10.46; Decl. Min. 354.

36 Plin. NH 11.187, discussing the belief that the heart of someone who died of heart disease or *venenum* cannot be cremated: *certe exstat oratio Vitelli qua Gnaeum Pisonem eius sceleris coarguit hoc usus argumento, palamque testatus non potuisse ob venenum cor Germanici Caesaris cremari; contra genere morbi defensus est Piso*; for the speech of Vitellius, cf. Suet. Vit. 2.3.

37 SC de Cn. Pisone patre 1.18: *morientem Germanicum Caesarem, cuius mortis fuisse caussam Cn. Pisonem patrem ipse testatus sit*; for discussion see Eck et al. 1996: 154–5.

38 There is a very good chance that both Tacitus and Suetonius had read the speech of P. Vitellius, which was certainly available to the elder Pliny: Tacitus judges him to have spoken 'with great eloquence' (Ann. 3.13.2), and Suetonius refers to the detail of Germanicus' 'unburnt heart' (Calig. 1.2) that according to Pliny (NH 11.187) played a prominent part in Vitellius' speech.

39 The fundamental studies are those of Versnel 1976 and 1981, whose conclusions I largely follow

signify more generally any prayer or ritual that consigned some person or thing to the gods of the underworld for destruction.⁴⁰ Tacitus makes it explicit that this is precisely what he meant by *devotiones* when he describes the items found in Germanicus' house as 'malefica by means of which it is thought spirits are consecrated to the powers of the underworld'. We should note in particular how extensively his description draws on the technical vocabulary of Roman cult: the verb *sacrare*, 'to consecrate', and, in a later passage, the nouns *sacra* and *immolationes*, 'rites' and 'sacrifices'. Likewise, he uses the term *carmina*, probably in a hendiadys with *devotiones*, to refer to the prayers and verbal invocations that these rituals involved.⁴¹

The charges against Piso thus included claims that he had performed certain types of cult acts to the same end as specified in the *lex Cornelia*: to bring about the death of the person against whom they were directed. It is accordingly the first recorded case in which a charge of *veneficium* also involved allegations of deviant religious behavior of the kind detailed in *The Opinions of Paulus*. There is ample evidence that rituals like those described by Tacitus were indeed practiced in this period, and it is clear enough why Germanicus' friends might have attributed them to Piso in making their case for *veneficium*: such rituals were regarded as a stealthy and surreptitious means of inflicting death, just like *venenum*.⁴² Not everyone may have believed in their efficacy, of course, but the intention behind them was precisely that which the *lex Cornelia* criminalized.

Several caveats are in order. First, it is not certain that Piso was charged under the *lex Cornelia*. The general tenor of our evidence makes this very likely, however, and the trial would in any case have set a precedent for the later treatment of *veneficium*. Secondly, it is difficult to know what role these reports of perverted cult acts played in the actual trial. Although Tacitus asserts that the prosecution alleged *devotiones* as well as *venenum* as the cause of Germanicus' death and spoke of Piso's *sacra et immolationes nefandae*, all the details indicate a focus on *venenum* in the usual sense: the condition of the corpse and the unburnt heart, the arrest and mysterious death of Martina, the seating arrangements at the banquet. Whether or not the lurid account of the objects found in Germanicus' room played a part in the actual trial is impossible to say. Lastly, even if the prosecution did elaborate on these stories, the issue was clearly not one of religious deviance *per se*, but rather the use of

here. Versnel argues that there were in fact two distinct forms of this ritual. One is known from Macrobius, who provides the alleged formula (*Sat.* 3.9.9–13); in this the general promised to give the gods of the underworld the enemy and their property as well as a sacrifice of three black sheep. The other is the act of self-sacrifice performed by the republican hero P. Decius Mus (Livy 8.9) and his son (Livy 10.28.12–29.7); in this case the general again promised the enemy to the gods of the underworld in return for their destruction, but also made them an immediate gift of himself by rushing into the midst of the enemy in order to be killed. The latter, although probably a secondary development, was by the late republic much better known; for its description as *devotio*, see, e. g., Accius TRF 283, *Rhet. Her.* 4.57, Cic. *Rab. Post.* 2 and ND 3.15.

40 Nep. Alc. 4.5 and 6.5; cf. Catull. 64.135. Common from the Augustan period on: e. g., Tib. 1.8.18, Ov. Am. 3.7.27.

41 In the first century BCE, the noun *carmen* was used to designate various types of 41 verbal formulae, including oracles (e. g., Cic. Div. 2.111 and Livy 10.8.2, of the Sibylline verses), laws (e. g., Cic. Rab. Perd. 13, Mur. 26, de Orat. 1.245, Leg. 2.59), and prayers (Varro regularly applies it to the ancient hymn of the *Salii*: Ling. 5.110, 7.2, 3, and 26, 9.61). Note especially that Livy uses *carmen* of the *devotiones* of the Decii (5.41.3, 10.38.10, 10.41.3; cf. Pliny NH 28.12), no doubt reflecting established usage.

42 For this line of thinking, cf. Ulpian, Ad edictum 50 (Dig. 29.5.1.18), who gives the example of someone killed *veneno vel etiam quo alio quod clam necare soleat*. On cursing rituals in antiquity, especially the inscribing of *carmina* on lead tablets, see e. g. Gager 1992: 13–22 and Ogden 1999: 3–30.

cult acts in a way analogous to the use of *venena*. Yet despite all these qualifications, the case nevertheless seems to have paved the way for the assimilation of *devotiones* and *carmina* to the already criminalized *veneficia*.

It is thus perhaps no accident that we hear from Tacitus about two trials in the years immediately following in which *carmina* or *devotiones* are associated with *veneficia*. The first is the case of Numantina that I discussed in the previous section, who was accused of using *carmina* and *veneficia* to drive her former husband mad, so that he threw his second wife out of the window (Tac. *Ann.* 4.22.3). The second is that of Claudia Pulchra, a grand-niece of Augustus, who in 26 CE was charged with *impudicitia*, adultery, and attempts on the emperor by means of *veneficia* and *devotiones* (*Ann.* 4.52.1). There has been considerable debate as to whether Pulchra was tried under the *lex Cornelia* or the *lex Julia de maiestate*, but as with Piso the effect would in either case have been to provide further precedent that allegations about *devotiones* could be accepted as relevant to a charge of *veneficium*. By the middle of the century, if we can attach any weight to the details of Tacitus' description, it had even become possible to make charges about *devotiones* without any reference to *venena*: Domitia Lepida, another grand-niece of Augustus and an aunt of the emperor Nero, was brought to trial on the charge that 'she had made an attempt on the emperor's wife by means of *devotiones* and was disturbing the peace of Italy by keeping too loose a restraint on her slave-troops in Calabria' (Tac. *Ann.* 12.65.1). Again, the lack of details makes it difficult to say anything very definite about the legal aspects of case, but the general trend seems clear enough.

This trend seems to have received formal confirmation in a *senatus consultum* that made the performance of *mala sacrificia* punishable under the *lex Cornelia*. The date of this ruling is unfortunately unknown; the most we can say is that it is prior to the second quarter of the third century CE, and may possibly be earlier than the reign of Marcus Aurelius.⁴³ In the form in which we have it, the decree is so laconic that it is impossible to know what it was that distinguished certain sacrifices as 'bad'. Yet seen in the larger context that I have been tracing here its implications are clear enough: *mala sacrificia* undoubtedly designated *devotiones* like those alleged against Piso, rituals meant to consign people to the gods of the underworld and thereby destroy them. The parallel phrasing of *venenum malum* in the original statute and *mala sacrificia* in the supplement provides some corroboration. We can also look ahead to the passage in *The Opinions of Paulus*: 'Those who have performed, or arranged for the performance of impious or nocturnal rites (*sacra impia nocturnave*), in order to enchant (*obcantarent*), transfix (*defigerent*), or bind (*obligarent*) someone, are either crucified or thrown to the beasts' (5.23.15). Although the author has used somewhat different language and has elaborated on the purpose behind these rites, his precept very probably derives ultimately from this *senatus consultum*.

We can thus identify a definite trend to extend the purview of the *lex Cornelia* to cover prayers and rituals that were intended to inflict death. The similarity of these *carmina* and *devotiones* to the type of *venena mala* specified in the original *lex Cornelia* is obvious: both were regarded as stealthy and surreptitious means of killing someone. In this way the *lex Cornelia* gradually came to concern deviant religious behavior. Yet we should not exaggerate the importance of this trend. As far as we can tell from the scanty evidence, a

43 Modestinus, *Pandectae* 12 (Dig. 48.8.13): *Ex senatus consulto eius legis poena damnari iubetur, qui mala sacrificia fecerit habuerit*. The career of Modestinus, a pupil of Ulpian who is thought to have been active c. 223–239 CE, provides a terminus ante quem; for the possibility of an earlier date, see n. 24 above. Should we associate it with the strange notice of the Chronographer of 354 (T. Mommsen, *Chronica Minora* 1.145) that under Claudius *primum venenarii et malefici comprehensi sunt: homines XLV, mulieres LXXXV ad supplicium ducti sunt*?

charge of *veneficium* continued to imply first and foremost the use of *venena*.⁴⁴ Moreover, most of the evidence indicates that only a quite restricted class of deviant cult acts were held to come under this law: those performed, we might say, 'for the sake of killing a person'. This, at least, was apparently the case as late as the Severan period.

With *The Opinions of Paulus*, however, we find a wider interpretation. Although rituals to 'enchant, transfix or bind' certainly included those intended to kill, they would also have included all the other purposes typically found in surviving curse tablets: to hinder competitors and opponents and to induce or quell sexual passion.⁴⁵ This shift away from a strict focus on rituals meant to kill to a concern with 'impious rites' more generally is strikingly parallel to developments in the treatment of *venena* that I sketched in the previous section, where *The Opinions of Paulus* extends the definition to include love potions and abortifacients. In both respects, *The Opinions of Paulus* seems to represent an interpretation of the *lex Cornelia* in which a concern for religious deviance was as important as the traditional concern with murder. As I have suggested, this concern for religious deviance also informs the general proscriptions of the *ars magica*. We should now consider in more detail how this came to be associated with the *lex Cornelia*.

3 Magi and the *ars magica*

I have so far tried to demonstrate that interpretation of the *lex Cornelia*, at least through the Severan period, developed fairly slowly and along fairly restricted lines. Given this gradual and limited development, there is no reason simply to assume that any charge involving the *ars magica* in the general sense of religious deviance must have been made under the *lex Cornelia*. We must instead focus our attention on evidence that explicitly associates *magi* or the *ars magica* with the *lex Cornelia* or with the sorts of thing that were certainly liable under it, namely, *venena* and *mala sacrificia* 'for the sake of killing a person'. The closer in date to the original *lex Cornelia* the evidence is, however, the more uncertain it becomes. We can accordingly see the pattern most clearly if we proceed in reverse chronological order.

About a century before *The Opinions of Paulus*, the Christian writer Tertullian several times associated *magi* with *sicarii* and *venenarii*. Particularly striking is a passage in his *Apology* where he takes on the charge that Christians are 'unprofitable in business affairs' (*Apol.* 42.1). After discussing the economic implications of the Christian rejection of traditional cult, he resorts to one of his favorite rhetorical tactics and turns the tables on his opponents: 'I will tell you plainly who perchance may rightly complain about the unprofitableness of Christians: first will be pimps, seducers, and panderers; then assassins, poisoners, and *magi*; next diviners, soothsayers, and astrologers. To be unprofitable to such as these is profit indeed!' ⁴⁶ Tertullian clearly means to distinguish three classes of villains:

44 See, e. g., the case reported by Galen (n. 22 above), and the stories told by Apuleius (*Met.* 10. 2–12 and 23–8), which although fictional surely reflect the cultural expectations of his readers regarding cases of *veneficium*.

45 See e. g. Gager 1992: 42–174 and Ogden 1999: 31–7.

46 *Apol.* 43.1: *Plane confitebor quinam, si forte, vere de sterilitate Christianorum conqueri possint. Primi erunt lenones, perductores, aquarioli; turn sicarii, venenarii, magi; item haruspices, harioli, mathematici. His infructuosos esse magnus fructus*. We may contrast the groupings typically presented by Cicero, e. g. *Off.* 3.36: *hinc sicae, hinc venena, hinc falsa testamenta nascuntur, hinc furta, peculatus; Off.* 3.73: *Neque enim de sicariis, veneficis, testamentariis, furibus, peculatoribus hoc loco disserendum est; Cat.* 1.7: *Quis tota Italia veneficus, quis gladiator, quis latro, quis sicarius, quis parricida, quis testentorum subiecto*.

the first and third connected with sexual license and fortune-telling, and the second, as other remarks make clear, with murder.⁴⁷ Although Tertullian is expressing here a distinctly Christian moral viewpoint, he also had a close familiarity with contemporary rhetorical technique and courtroom practice. There is thus a reasonable chance that his grouping of *sicarii*, *venenarii*, and *magi* might reflect current interpretation of the *lex Cornelia*: that *magi*, insofar as they too can kill people by stealth, should be liable under the same law as assassins and poisoners. But there is little reason to deduce from this that magic in general, as a type of religious deviance, was at issue.

The trial of Apuleius some fifty years previous provides negative confirmation for this view. The key issue in this trial, as I have argued elsewhere, was precisely that of religious deviance.⁴⁸ The prosecution certainly attempted to demonstrate that Apuleius had knowledge of things like *venena* and *carmina* and *mala sacrificia* that would allow him to kill as well as inflict other sorts of harm.⁴⁹ But although they had toyed with the idea of blaming him for the death of his stepson Pontianus, they did not in the end include this in the formal charges (*Apol.* 1–2). In fact, the only victim they apparently named was his wife Pudentilla, and even in her case it was her chastity rather than her life that Apuleius was alleged to have assailed. The charge, correspondingly, was not one of *veneficium*, as Apuleius deliberately indicates in several asides, but instead something more general that Apuleius himself no doubt rightly characterized as one of being a *magus* or practicing *magia*.⁵⁰ Whether this charge was brought under the *lex Cornelia* is impossible to say. But there is no need to assume that it was simply because the *lex Cornelia* seems the most relevant of attested laws. There is in fact no need to assume that Apuleius must have been charged under a specific law at all. For a criminal charge in a *cognitio extra ordinem*, as was presided over by a provincial governor, all that was really necessary was to allege wicked and potentially disruptive behavior.⁵¹ In my view, if the *lex Cornelia* was relevant at all to this case, it was simply as a general precedent for the criminalization of *veneficia* and *mala sacrificia*.

In the late first century BCE the association of *magi* with *veneficium* is attested by an off-hand remark of Quintilian, who cites as an example of the issue of definition the question of whether *carmina magorum* could count as *veneficia* (*Inst.* 1.3.7). The matter itself is clear, he says, since everyone knows that *carmina* are not the same thing as a *mortifera potio*; nevertheless, the question is whether they ought to be called by the same name. This surely reflects a popular opinion that *magi* had knowledge of *carmina* that could cause death and that the use of such deadly *carmina* ought like deadly *venena* to be liable under the *lex Cornelia*. But there is no reason to deduce from this that other forms of the *ars magica* were urged to be similarly liable.

47 Cf. Tert. *Spect.* 2: *vides homicidium ferro veneno magicis devinctionibus perfici*; *Pud.* 5: *venenarii et magi* know how many murders follow in the wake of adultery. For the collocation *veneficus et magus*, cf. Dio 77.17.2 (φάρμακός καὶ γῶης); it dates at least to the mid-second century CE (*Apol.* *Apol.* 78.2).

48 Rives 2003: 322–8.

49 They alleged, for example, that Apuleius had attempted to buy a *lepus marinus*, a type of poisonous mollusk (*Apol.* 33.3; cf. Plin. *NH* 9. 155 and 32.8–9), and had engaged in nocturnal rituals (*Apol.* 57–8).

50 For *veneficium*, see *Apol.* 26.8–9: people who accuse *magi* behave very differently from those who accuse *sicarii*, *venenarii*, or thieves; *Apol.* 32.8: no one would regard it as just if he had been indicted for *veneficium* merely for buying substances that could be used to kill; *Apol.* 41.6: if his opponents knew he had read treatises on poisonous animals they would also have charged him with *veneficium*. For *magia*, see *Apol.* 1.5, 2.2, 25.5 and 8, 28.4, 29.1, 47.1, 66.3, 67.1, 79.2 and 83.5.

51 See the succinct comments on the *cognitio extraordinaria* in Bauman 1996: 50.

That the «magian art» could take different forms, and that these were culpable to different degrees and for different reasons, is suggested by two political trials reported by Tacitus. One of these took place in 66 CE, when Q. Marcius Barea Soranus was accused of sedition and conspiracy against Nero; in addition, his daughter Servilia was said to have «lavished money on *magi*». That was in fact true, Tacitus remarks, although she had only inquired about the outcome of her father's trial (*Ann.* 16.30.2). Nevertheless, she was summoned before the Senate, and asked whether she had sold her jewelry «to raise money for the performance of *magica sacra*». In response, she pleaded that she had «sought out no impious gods, no *devotiones*, nor anything by ill-omened prayers» other than that her father might be unharmed; she had not even mentioned the emperor except among the gods (*Ann.* 16.31). Dio, in contrast, says that Soranus was charged with «employing a *mageuma* with his daughter's help, since when [Nero] was ill they offered a certain sacrifice» (61.26.3, in the epitome of Xiphilinus). It thus seems likely that the prosecution argued that Servilia had consulted *magi* about *devotiones* to use against the emperor, and that Servilia herself claimed in her defense to have consulted them only for the purposes of divination. Again we see the popular notion that *magi* had knowledge of rituals that could cause illness or death, but we see as well an alternative view of *magi* as experts in divination. This is a valuable reminder that the term *magus* and its derivatives had no single fixed meaning, but was instead associated with a range of esoteric *artes*. Servilia's defense suggests that in her case it was the type of *ars magica* that was employed «for the sake of killing a person» that was at issue.

The other case took place fifty years previously. In the year 16 CE a young man named M. Scribonius Libo Drusus was brought to trial before the Senate on charges of conspiring against Tiberius and other leading men of the state, apparently after having been under suspicion for some time. Libo killed himself before proceedings came to an end, yet Tiberius carried on with the trial all the same, resulting in Libo's posthumous condemnation and in thanksgivings for the safety of the emperor.⁵² Tacitus, who provides the fullest account of these events, indicates that alleged consultations with various sorts of diviners played an important part in the charges against Libo. Firmius Catus, one of the men who ensnared him, had urged him towards «the promises of Chaldeans, the rites of *magi*, and even the interpreters of dreams» (*Ann.* 2.27.2), and a certain Junius reported that Libo had tried to persuade him «to summon the shades of the dead by means of *carmina*», presumably for the purposes of necromancy (*Ann.* 2.28.2); C. Vibius, who acted as prosecutor in the trial, claimed that Libo had made inquiries as to whether he would have enough wealth to pave the road to Brundisium with money (*Ann.* 2.30.1). The only other specific charge that Tacitus mentions is a memorandum in Libo's hand with mysterious marks against the names of Tiberius and other leading men (*Ann.* 2.30.2).

One consequence of this trial, it seems, in addition to the fate of Libo himself, was a senatorial decree condemning *mathematici* and *magi*: except for those who promised to foreswear their arts, those who were citizens were exiled and non-citizens put to death. Multiple sources attest to this decree, with some variation. Tacitus speaks of both *mathematici* and *magi*, and places the decree immediately after the trial of Libo; Suetonius, employing a topical rather than chronological principle of organization, does not connect it

52 The Fasti Amertini (for September 13) presumably provide the official version of these events: *fer(iae) ex s(enatus) c(onsulto), q(uod) e(o) d(ie) nefaria consilia, quae de salute Ti. Caes. liberorumque eius et aliorum principum civitatis deque) r(e) p(ublica) inita ab M. Libone erant, in senatus convicta sunt* (*Inscr. Ital.* 13.2, p. 193); for the details, see Tac. *Ann.* 2.27–32 and the brief references in Vell. Pat. 2.129.2 and 130.3, Sen. *Ep.* 70.10, Suet. *Tib.* 25.1 and 3, Dio 57.15.4–5. See further Liebs 1997: 149–50 and Dickie 2001: 198–200.

with Libo, and refers only to *mathematici*.⁵³ Dio reports that Tiberius took action against astrologers, *goetes*, and those who practiced divination in any way whatsoever; he places this report immediately after his account of the trial of Libo, although he connects it with Tiberius' own proficiency in divination rather than explicitly with the trial.⁵⁴ Lastly, Ulpian, who dates the decree to the year after the trial of Libo, apparently quotes the actual text of the *senatus consultum*, which he says was directed against *mathematici*, Chaldeans, *harioli*, and all others who have engaged in similar undertakings.⁵⁵

Did any of this have a connection with the *lex Cornelia*? Some scholars have thought so.⁵⁶ The issue, however, hinges on the terms *magi* and *goetes*. According to Tacitus, Libo was alleged to have turned to *magorum sacra*; yet for what purposes? The fact that Tacitus associated these *magi* with Chaldeans and the interpreters of dreams clearly indicates that in his view what Libo wanted was information about the future. It is of course possible that Libo's prosecutors also accused him of resorting to *magi* for *venena* and *devotiones* with which to kill his proposed victims. Tacitus undoubtedly molded his account to suit his larger purpose, which was to indict at its origins the whole practice of *delatio*, in his view one of the worst vices of the principate. Comparison with the other references suggests that, in order to heighten the heinousness of the informers, he may have downplayed the seriousness of the situation and depicted Libo as a harmless if foolish young man; consequently, Tacitus may have deliberately ignored charges regarding *veneficia* and *devotiones*.⁵⁷ Yet it is worth noting that he does not do this in his reports of other cases that he regarded as equally unfounded, such as those of Claudia Pulchra and Domitia Lepida mentioned in the previous section. Moreover, the subsequent *senatus consultum*, which surely had some connection with the trial of Libo, very obviously concerned divination and not the use of *veneficia* or *devotiones* of the sort with which the *lex Cornelia* was concerned. Ulpian's citation of the decree is quite clear about this, and Dio's version, which seems to be a paraphrase, strongly suggests that *goes* here specifically denotes an expert in divination; there is thus every reason to interpret Tacitus' *magi* in the same way. The issue of *magi* and their *ars* in the trial of Libo and the subsequent *senatus consultum*, then, was completely unrelated to the concerns of the *lex Cornelia*.⁵⁸

53 Tac. Ann. 2.32.3: *Facta et de mathematicis magisque Italia pellendis senatus consulta; quorum e numero L. Pituanius saxo deiectus est, in P. Marcium consules extra portam Esquilinam, cum classicum canere iussissent, more prisco advertere*. Suet. Tib. 36: *Expulit et mathematicos, sed deprecantibus ac se artem desituros promittentibus veniam dedit*.

54 Dio 57.15.8: πάντας τοὺς ἄλλους τοὺς τε ἀστρολόγους καὶ τοὺς γόητας, εἰ τέ τινα εἴτερον καὶ οἵτιονοδον τρόπον ἐμαντεύετο τις, τοὺς μὲν ξένους ἐθανάτωσε, τοὺς δὲ πολίτας, οἷοι καὶ τότε ἔτι, μετὰ τὸ πρότερον δόγμα δι' οὗ ἀφ' ὁρέοντο μηδὲν τοιοῦτον ἐν τῇ πόλει μεταχειρίζεσθαι, ἐσηγγέθησαν τῇ τέχνῃ χρώμενοι, ὑπερώρισεῦτοίς γὰρ πειθαρχήσαντες αὐτῶν ἄδεια ἐδόθη.

55 Ulpian, *De officio proconsulis* 7, Coll. 15.2.1: *Praeterea interdictum est mathematicorum calida impostura et obstinata persuasione. Nec hodie primum interdicti eis placuit, sed vetus haec prohibitio est. Denique extat senatus consultum Pomponio et Rufo cons. [17 CE] factus, quo cavetur, ut mathematicis Chaldaeis ariolis et ceteris, qui simile inceptum fecerunt, aqua et igni interdicatur omniaque bona eorum publicentur, et si externarum gentium quis id fecerit, ut in eum animadvertatur*.

56 See, e.g., Mommsen 1899: 640, Pharr 1932: 280, Massonieu 1934: 171–3, and Desanti 1990: 33–41, the best discussion.

57 For discussion, see Shorter 1972, with references to earlier views.

58 Cf. Desanti 1990: 37–9, who convincingly demonstrates that the decree concerned diviners alone. She further argues, however (39–41), that the fact that some of the diviners were called *magi* makes it likely that the decree was a deliberate extension of the *lex Cornelia*; but this is to assume that the *lex Cornelia* already had some connection with *magi*, for which at this stage there is no evidence. Earlier work on magic and law sometimes failed to make any distinction what-

The last case that I will consider here is the most uncertain of all: the supposed trial of P. Nigidius Figulus, a friend of Cicero's and one of the foremost scholars of the late republic. Nigidius had a particular interest in divination, and wrote treatises on private augury, the reading of entrails, the significance of dreams, and the interpretation of thunder as well as a major work on astrology. Among later generations his renown was primarily as an astrologer, although Cicero credited him with reviving the Pythagorean tradition and Jerome, possibly relying on a biography by Suetonius, described him as *Pythagoricus et magus*.⁵⁹ Several scholars have suggested that at some point in his career he was tried on a charge of magic, but the evidence is limited to two brief notices of uncertain value.⁶⁰ Dio says that because of his expertise in astrology Nigidius was accused of engaging in certain forbidden pursuits, and the author of an anonymous rhetorical exercise claims that the historian Sallust had on reaching adulthood *deviated into the fellowship of the Nigidian sacrilege* and was as a consequence *dragged twice before the judge's bench*.⁶¹ But it is unclear whether or not Dio is referring to a formal legal charge, and the historical value of the invective against Sallust is highly doubtful.

Even if we grant the existence of a trial, however, what reason is there to connect it with the *lex Cornelia*?⁶² Very little, although not quite none. As we have seen, Cicero provides contemporary confirmation for the first half of Jerome's description of Nigidius as *Pythagoricus et magus*; it is not impossible that the second appellation was contemporary as well. As we have seen, being a *magus* did not in itself make one liable under the *lex Cornelia*; it was instead the particular sorts of magian arts in which one was said to engage. Now the elder Pliny regularly presents *magi* as expert in the properties of the sorts of natural substances that would normally be described as *venena*, and it is highly likely that he obtained this information from, among other sources, a Hellenistic treatise that circulated under the name of Pythagoras. Since Pliny further suggests that Nigidius may have interested himself in this sort of Pythagorean pseudepigrapha, he may possibly have been credited with an expertise in the use of *venena*.⁶³ But the fact that the majority of the evidence stresses instead his interest in divination, it seems much more likely that, if he

oever between divination from *veneficium*, treating all cases alike as trials for *magic*; so, notably, Massonieu 1933: 177–87 in her survey of trials in the first century CE.

59 Swoboda 1889: 91–128 collects the fragments of his works on divination. Fame as astrologer: Lucan 1. 639–72, Suet. Aug. 94.5, Aug. *De civ. Dei* 5.3; cf. Apul. *Apol.* 42.6–8 for an anecdote about using a boy as a medium. Pythagorean: Cic. *Tim.* 1.1; Jerome, Chron. Ol. 183, 4 = Suet. F 85* Reifferscheid (45 BCE): *Nigidius Figulus Pythagoricus et magus in exilio moritur*; cf. Schol. Bob. ad Cic. Vat. 14 (quoted below, n. 61). See in general Dickie 2001: 170–2.

60 Some regard the exile reported by Jerome as a legal penalty, but it was instead undoubtedly a political matter resulting from Nigidius' support of Pompey in the civil wars (Cic. *Att.* 7.24; cf. Cicero's letter of condolence, *Fam.* 4.13).

61 Dio 45.1.4: καὶ κατὰ τοῦτο καὶ αἰτίαν ὡς τινας ἀπορήτους διατριβὰς ποιοῦμενος ἔσχευ. [Cic.] In Sall. 14: *At hercules lapsus aetatis tirocinio [Sallustius] posted se correat. Non ita est, sed abiit in sodalicium sacrilegi Nigidiani; bis iudicis ad subsellia attractus extrema fortuna stetit et ita discessit ut non hic innocens esse sed indices peierasse existimarentur*. On the sodalicium, cf. Schol. Bob. ad Cic. Vat. 14: *Fuit autem illis temporibus Nigidius quidam vir doctrina et eruditione studiorum praestantissimus, ad quem plurimi conveniebant. Haec ab obrectatoribus velut factio minus probabilis iactitabatur, quamvis ipsi Pythagorae sectatores existimari vellent*.

62 As do, e.g., Mommsen 1899: 640 and Desanti 1990: 21–5, who sees Nigidius as a diviner but again suggests that the term *magus* is reason enough to see a connection with the *lex Cornelia*.

63 *Magi*: e.g., NH 21.66, 22.50, 25.129, 28.47, 29.68, 36.139, 37.54. Pythagoras and *magi*: NH 24.156–67; cf. 22.20, 25.13). Nigidius and *magi*: NH 29.138 and 30.82–4, on crickets and ticks respectively; it is likely that these citations come from Nigidius' work on animals (Swoboda 1889: 131–3).

actually was called a *magus* in lifetime, it would have been in reference to that.⁶⁴ Again, then, there is little reason to connect any charge against Nigidius Figulus with the concerns of the *lex Cornelia*.

The earliest legal cases involving *magi* and *artes magicae*, then, seem to have dealt with divination, an issue completely removed from the *lex Cornelia*'s focus on the handling of *venena* for the sake of killing a person. It is only in the middle of the first century CE that we begin to see references to *magi* and their arts in connection with charges of *veneficium* and the *lex Cornelia*.⁶⁵ This association was the result, I would argue, of two distinct developments. On the one hand, as we have seen, the purview of the *lex Cornelia* had by this time been extended to cover the employment of *devotiones* and the like with a similar intent to kill. On the other, the term *magus* and its derivatives were coming to be more and more closely associated with such techniques.⁶⁶ Nevertheless, the susceptibility of *magi* to charges under the *lex Cornelia* continued to be limited to the use of their *ars* 'for the sake of killing a person'; this, at least, is what is implied in the remarks of Tertullian. Again, as with *venena* and *mala sacrificia*, it is only in *The Opinions of Paulus* that we find a significantly different interpretation.

4 The *lex Cornelia*, *The Opinions of Paulus* and religious deviance

As I have tried to demonstrate, careful consideration of the evidence suggests that the interpretation of the *lex Cornelia* found in *The Opinions of Paulus* is not particularly representative of legal thought or practice, at least insofar as we can trace it into the early third century CE. Consequently, any attempt to reconstruct on that basis the treatment of magic in Roman law must inevitably beg a number of questions. If we temporarily set it aside, however, two things become immediately clear.

First, the view that the *lex Cornelia* was the basis for the Roman law on magic in general, i. e., 'magic' understood as religious deviance, is not as well founded as it may seem. The initial focus of the *lex Cornelia* on the handling of *venena* 'for the sake of killing a person' was soon broadened to include the employment of rituals for the same purpose,

64 Note also the tendency in Republican writers to associate *magi* with various forms of divination: Catull. 90.1–2; Cic. *Div.* 1.46, 47, 90–1; cf. Strabo 16.2.39, Val. Max. 1.6. ext. lb. Vell. Pat. 2.24.3.

65 Tacitus very briefly mentions three other trials that involved allegations concerning *magi*: that of Mam. Aemilius Scaurus, accused in 34 CE of 'adultery with Livia and *magorum sacra*' (*Ann.* 6.29.4); that of Lollia Paulina, an alleged rival of Agrippina for the hand of Claudius, charged in 49 CE with 'questioning Chaldeans, *magi*, and the oracle of Clarian Apollo about the emperor's marriage' (*Ann.* 12.22.1–2); and that of Statilius Taurus, charged in 53 with 'a few counts of extortion but chiefly *magicae superstitiones*' (*Ann.* 12.59). Divination is again obviously the issue in the case of Paulina; for the other two, the information is too vague to allow conclusions one way or another, although Liebs 1997: 150–1 suggests that in the last case we should understand *magicae superstitiones* as equivalent to *mala sacrificia*.

66 Close examination of extant texts indicates that prose writers from the time of Cicero tended to use the word *magus* in its original technical sense of 'Persian wise man/priest' and, on the few occasions when they used the adjective *magicus*, did so in the same sense. In contrast, Latin poets from Vergil onwards applied the adjective *magicus* to the collection of tropes and folk beliefs that constitutes the typical literary description of witches and witchcraft; when they did use the noun *magus*, they used it to mean someone adept in these *artes magicae*. This pattern begins to change with the elder Pliny, who uses *magus* and its derivatives in a way that come closer to that of the poets, but breaks down completely only with Apuleius. I hope elsewhere to present these findings in more detail.

but the evidence strongly suggests that it thereafter changed relatively little. The *Institutes* of Justinian, for example, offers the following interpretation of the *lex Cornelia* with regards to *veneficium*: 'The same law likewise mandates capital punishment for *venefici*, who have killed people by means of foul arts, such as *venena* or magical whispers, or have sold dangerous drugs to the public.'⁶⁷ Apart, perhaps, from the last clause, which incorporates the principle of the *senatus consultum* on *pigmentarii* that I discussed in the first section, this interpretation would probably not have raised many eyebrows in the reign of Tiberius, when charges of *veneficium* had come to include allegations about *devotiones*. In both periods, it seems, the emphasis was on murder or intended murder through stealthy means. There were attempts, of course, to extend purview of the law more broadly, to cover the use of *venena* and *sacra* for purposes other than murder, and no doubt these arguments on occasion had an effect. But the evidence suggests that on the whole they had relatively little long-term impact on legal opinion and practice.⁶⁸

Secondly, the construction of a category of 'religious deviance' in Roman law was not nearly so clear cut as the exposition of the *lex Cornelia* in *The Opinions of Paulus* would suggest. For one thing, different kinds of ritual action were subject to different restraints for different reasons. The most obvious example is divination. As we saw with the trial of Libo Drusus and the subsequent expulsion of astrologers and *magi*, legal restraints on divination are already apparent in the first years of the reign of Tiberius. In fact, the key precedents were established in the reign of Augustus, and a concern with divination can be traced back even earlier.⁶⁹ There is no good reason to assume that the restriction and control of divination had anything to do with the *lex Cornelia*; the mere fact that some diviners were known as *magi*, or conversely that some people described as *magi* were thought to have expertise in divination, provides no overlap with its concerns. Nor is there any evidence here for a category of religious deviance. Instead, what we find is a legal principle that takes for granted the efficacy of particular ritual activities, and restricts their employment for particular purposes.

The prosecution of religious deviance *per se*, I would argue, developed in quite a different context, namely, the *cognitiones extra ordinem* conducted by imperial prefects and governors. In such a context there was no need to begin with the tight focus of the *lex Cornelia* and then attempt to widen it; one could instead simply charge that a person was a *magus*, i. e., involved in improper religious behavior, and therefore ought to be punished. As I have suggested, this is what we find in the trial of Apuleius. It was through this interaction between Roman officials and members of the public that the new criminal category of magic was thrashed out.⁷⁰ Its connections with the *lex Cornelia* were rather tenuous and, in an important sense, tangential.

What of *The Opinions of Paulus*, then? We can certainly see in this text the influence that the new legal category of magic had on the interpretation of the *lex Cornelia*, particularly in its more expansive treatment of *venena* and *sacra impia*. The very fact that the latter phrase, with its emphasis on cultural and religious norms, replaces the language

67 4.18.5: 'Eadem lege [Cornelia] et *venefici capite damnantur, qui artibus odiosis, tam venenis vel susurris magicis, homines occiderunt vel mala medicamenta publice vendiderunt*.'

68 Cf. Gordon 1999: 256–60.

69 In 139 BCE, the *praetor peregrinus* expelled Chaldeans from Rome and Italy (Val. Max. 1.3.3); in 33 BCE Agrippa expelled astrologers and *goetes* from Rome by aedilician decree (Dio 49.43.5); in 12 BCE Augustus ordered the confiscation and destruction of oracular texts (Suet. *Aug.* 31.1); in 11 BCE he forbade private consultation of diviners and consultations about death (Dio 56.25.5). For full discussion of these and later measures, see Cramer 1954: 232–81.

70 For other evidence of a general charge of magic, see Dickie 2001: 149–51.

of *mala sacrificia*, the phrase used in the *senatus consultum* that presumably lay behind this provision, is in itself illustrative of this influence. But the establishment of a charge of magic presented a problem to legal scholars. How was this new charge to be accommodated within the traditional categories of Roman law? The redactor of *The Opinions of Paulus* chose to exploit the associations of *magi* with the *lex Cornelia*, limited as they were, and class the *ars magica* under that rubric. In doing so, he was perhaps following a line of legal thought in the late classical and post-classical periods that is otherwise unattested. It is equally possible, however, that it constituted an idiosyncratic and maverick solution to the problem of classification. The absence of evidence makes it impossible to know.

What we can know is that his approach represented a dead end in the legal response to religious deviance. At about the same time that the anonymous redactor of *The Opinions of Paulus* was at work, a man named Gregorius, apparently acting in an official or semi-official capacity, was busy compiling a collection of imperial rescripts dating from the reign of Hadrian down to the year 291 CE.⁷¹ Gregorius, like earlier legal scholars, arranged his material as far as possible under established general rubrics. Like the redactor of *The Opinions of Paulus*, he used the *lex Cornelia de sicariis et veneficiis* as the rubric for material concerning murder.⁷² But he differed, it seems, in locating laws concerning magic under a separate rubric, *de maleficis et Manichaeis*, which Gregorius himself may have devised.⁷³ The association here of *malefici*, a word that had come to be a synonym for *magi*, with Manichaeans, indicates that the focus of this rubric was precisely religious deviance.⁷⁴

This new rubric also allowed more scope for the development of the category of religious deviance, a possibility of which later legal scholars took advantage. Like Gregorius, the authors of legislation in the fourth century and the editors of the Justinianic codifications alike continued to employ the *lex Cornelia* as the rubric for murder, including murder effected by *venena* or *devotiones*.⁷⁵ But they expanded Gregorius' rubric *de maleficis* into an even broader category of religious deviance by integrating the proscription of *magi* and the like with the originally separate treatment of divination. The title of this expanded rubric, *de maleficis et mathematicis et ceteris similibus*, indicates the extent to which diviners and traffickers in potions and spells had come to be regarded as two species within the same genus.⁷⁶

71 See Barnes 1981: 10 and Corcoran 1996: 25–42.

72 Cf. *Coll.* 1.7–9, with rescripts of Caracalla in 215 CE (*Cod. Just.* 9.16.1. pr.), Severus Alexander in 222 CE (*Cod. Just.* 9.16.1.1), and Diocletian in 290 CE (*Cod. Just.* 9.16.4).

73 *Coll.* 15.3; the only item known to have been included under it is Diocletian's rescript on the Manichees. The rescript of Antoninus Pius that murder by *venenum* is worse than murder by the sword (*Cod. Just.* 9.18.1), which presumably came from the *Codex Gregorianus*, may also have been under this rubric, which is where Justinian's compilers placed it; but it may have instead been under the *lex Cornelia*.

74 On the meaning of *maleficus*, cf. Apul. *Met.* 3.16, 6.16, 9.29, 9.31, and especially the phrase *magica maleficia* in the *Apol.* 1.5, 9.2, 42.2, 61.2, and 69.4; cf. 51.10 and 96.2. It may have begun as a popular usage: Lact. *Div. inst.* 2.16.4, Constantius in *Cod. Theod.* 9.16.4 and 6, Aug. *De civ. D.* 10.9.

75 *Cod. Theod.* 9.14, *Cod. Just.* 9.16, D. 48.8. It is significant that Justinian's compilers included under this rubric of the Digest no material from the classical jurists relevant to a charge of magic, except as a means to murder. The same is true of the interpretation offered in Justinian's *Institutes* (4.18.5): *«Eadem lege [Cornelia] et venefici capite damnantur, qui artibus odiosis, tam venenis vel susurris magicis homines occiderunt vel mala medicamenta public vendiderunt»*.

76 *Cod. Theod.* 9.16 and *Cod. Just.* 9.18. A separate rubric dealing with divination is attested already for the Severan period: Ulpian, *De officio proconsulis* 7 (*ap. Coll.* 15.2): *de mathematicis et vaticinatoribus*; cf. *PS* 5.21, *de vaticinatoribus et mathematicis*.

The construction of a legal category of religious deviance was a very gradual and complex process, and one that fluctuated according to the changing social and cultural context. Indeed, there never was a single legal category at all. At the same time that the rubric of *malefici et mathematici* was becoming fixed, new classes of religious deviants were being defined under the names <heretic> and <pagan>. Yet the development of a criminal category of *magus/maleficus* played a distinctive part in establishing religious deviance as an object of official intervention and control. By seeing the *lex Cornelia de sicariis et veneficiis* in its proper light, we can appreciate this more clearly.

Chapter 4

Religion, Law and the Roman Polity: The Era of the Great Persecution¹

by

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In 303 CE, the emperor Diocletian invoked the so-called «Great Persecution» against the general Christian population of the Roman Empire. Consequently, the late third and early fourth century is rightly portrayed as an era of intense religious conflict. As in earlier efforts to enforce ritual conformity, the promoters of the persecution and the Christians whom it targeted defined proper worship in different ways and disagreed deeply over how to treat those whose practices deviated from traditional Roman custom. Nevertheless, Diocletian and his colleagues in the tetrarchy departed from earlier precedents by appealing not just to traditional Roman jurisprudence, but also to Neoplatonist political theory in justifying their legislation requiring religious conformity. Such sophisticated efforts to support laws regulating proper worship, in turn, prompted Christian intellectuals to respond in kind, defending their resistance to the tetrarchy's legislation in legal and philosophical arguments. These exchanges are significant because, despite intense disagreement over the character of public religion, they show the extent to which Christians came to share and appropriate the assumptions and arguments of their opponents. In so doing, they enabled the old tenets of traditional Roman jurisprudence, together with the new arguments of Neoplatonist political philosophy, profoundly to shape the way in which emperors and intellectuals conceptualized the relationship between law and religion for the next several centuries, at least in the East. This conclusion builds on the recent work of Dominic O'Meara, which seeks to overturn the long-standing assumption that Neoplatonists avoided both political theory and involvement in public affairs.²

In this essay, I establish that Christians claimed to share two fundamental assumptions with their pagan adversaries. First, they declared that law regulating religious worship was part of the foundation and identity of a given community. In this regard, they adopted not only the traditions of Roman jurisprudence, but also the Neoplatonists' reading of Plato's *Laws*. Second, certain Christians, following Neoplatonists, claimed that they followed a divine law that transcended and superseded the laws of the polity. In so doing, they

appropriated the Neoplatonists' vision of law as a divinizing agent for human communities and individual souls, even while rejecting the traditional rites that these philosophers continued to associate with the best possible polities in practice. Probably the first Christian intellectual to adapt this element of Neoplatonist political theory was Lactantius, a professor of rhetoric employed by Diocletian in Nicomedia just as the push toward persecution was accelerating. Lactantius' formulation, in turn, influenced the emperor Constantine's description of the Christian polity that he governed, thus embedding Neoplatonist principles into Roman political rhetoric, despite the Christian character of Constantine's regime. So much did this view of law and the polity shape fourth-century political thought, I argue, that Augustine was forced to address it when setting out his very different view in the *City of God*.

1 Religious law and community identity

The arguments that circulated during and immediately after the Great Persecution suggest that emperors and public intellectuals, whether Christian or pagan, all believed that legislation regulating divine worship was part of the foundation and identity of a given community. Pagans seeking to justify the general use of force against the empire's Christian citizens explicitly linked the performance of particular types of divine worship or *sacra* with what might be called national identity. Christians responding directly to these charges did likewise. In making these arguments, both sides drew deeply on the jurisprudence of Ulpian and Plato's *Laws* to bolster their claims.

Although the edicts inaugurating the persecution are no longer extant,³ the decree ending this episode does survive. Issued in 311 by Galerius, Diocletian's successor and erstwhile junior colleague, it sets out the emperors' justifications for the persecution and outlines what their expectations had been in adopting such a policy. Galerius, in short, claims that they launched the persecution because Christians did not uphold the type of divine worship appropriate to the Roman People. In the edicts issued against the Christian populace in 303, he says, the emperors strove,

to set everything right in accordance with the ancient laws and public discipline of the Romans and to ensure that even the Christians, who had abandoned the way of life (*sectam*) of their ancestors, should return to a sound frame of mind (*ad bonas mentes*); for ... such self-will (*voluntas*) had come upon these Christians ... that they no longer followed those usages (*instituta*) of the ancients, ... but were making up for themselves the laws which they were to observe.⁴

Conceding failure, Galerius reversed the edicts of persecution and allowed Christians to reconvene for worship, provided that they «pray to their god for our safety (*pro salute nostra*) and for that of the state and themselves ..., so that from every side the state may be kept unharmed» (Lactant. *De mort. pers.* 34). Galerius' statement effectively conveys an intimate connection between *disciplina* or public order and legislated religious observances or *sacra*, linking these *sacra* to the preservation (*salus*) of the *res publica* and its inhabitants. Not surprisingly, Galerius also suggests that what Christians considered to be *sacra* were not viewed as *Roman* by the emperors, at least prior to the persecution, in that they deviated from ancestral custom. Willing to legalize Christianity only if its followers pray for the well-being of the state and its citizens, Galerius indicates that rites other than

1 I presented early versions of this paper at the conference, «Public Dimensions of Private Religiosity: Religion and *Ius Publicum*,» sponsored by the USC Center for Law, History and Culture on 10 October 2003 and at the North American Patristics Association Conference in Chicago on 2 June 2005. I would like to thank Clifford Ando, H. A. Drake, Peter Digeser, Olivier Dufault, Heidi Marx-Wolf and Tom Schrock for their help in various stages of this paper. I am also grateful to McGill University, the Social Science and Humanities Research Council of Canada, and to the University of California at Santa Barbara for their material support.

2 O'Meara 2003.

3 They are described but not quoted by Lactantius (*De mort. pers.* 13–15) and Eusebius (*Hist. eccl.* 8.2, 6).

4 Lactant. *De mort. pers.* 12.1–2 (trans. Creed throughout).

those sanctioned by ancient laws and ancient usage could potentially undermine the *res publica*. For this reason, only a form of Christianity dedicated to the *salus* of the state could be woven into the fabric of Roman society.

Galerius' claims accord with the views of both Ulpian and third-century Neoplatonists that legislation concerning divine worship constitutes part of the foundation and identity of the polity. Indeed this consonance should not be surprising, for the court in Nicomedia whence Galerius issued his edicts had ties with both sources. On the one hand, under Diocletian, the jurists Gregorian and Hermogenian had reorganized imperial legislation and jurisprudence, an effort that drew heavily on Ulpian's thought and work.⁵ At the same time, Porphyry, the most eminent student of Plotinus, Neoplatonism's founder, had voiced his concerns about Christianity's detrimental effect on the Roman polity not long before Diocletian issued the edicts of persecution against the general Christian population,⁶ and perhaps at the court's behest.⁷

2 Roman Jurisprudence

At the beginning of his *Institutes*, Ulpian linked law regarding religious practice to the foundation of the Roman polity. This passage survives in Justinian's sixth-century *Digest*, where it defines the terms under which the legislation in the Byzantine collection has been organized. According to Ulpian,

There are two branches of legal study: public and private law. Public law is that which respects the establishment of the Roman commonwealth (*ad statum rei Romanae spectat*), private that which respects individuals' interests, some matters being of public and others of private interest. Public law covers (*constitit*) religious affairs (*sacris*), the priesthood (*sacerdotibus*), and offices of state. Private law is tripartite being derived from principles of *ius naturale*, *ius gentium*, or *ius civile*.⁸

Scholars grappling with Ulpian's concept of *ius publicum*,⁹ despite the fragmentary character of his texts, have increasingly understood him to be, first, defining public law as constituting the foundation, even the identity, of the Roman polity, and, second, identifying laws concerning divine worship as an integral part of that foundation.¹⁰

3 Neoplatonism, law and identity

Legislation regulating divine worship was also part of the foundational character of the best regimes for the Neoplatonists Plotinus and his immediate successor. Porphyry; this was

5 Digeser 2000: 53; Honoré 1994: 182–83; Corcoran 1996: 26, 32, 37, 41–42, 294–95.

6 Although Bidez 1913 thought that Porphyry's *Philosophy from Oracles* was a product of the philosopher's youth, it is now more widely accepted that this work is a product of his later years, written and delivered in the context of the Great Persecution. See O'Meara 1959, Wilken 1979, Simmons 1995: chapter 1; Digeser 1998; and eadem 2000: chapter 4.

7 Lactantius *Div. inst.* 5.2.3–4, 7 (trans. A. Bowen and P. Garnsey throughout, sometimes modified). See also Beatrice 1993 and Reale 1993; *contra*, see Barnes 2001: 158–59.

8 *Dig.* 1.1.1.2; see also Justinian *Institutes* 1.1.1.

9 For detailed analyses of Ulpian's life and work, see Crifò 1976a and Honoré 2002. On *ius publicum* see, for example, Nocera 1946; Berger 1950; Mülllejans 1961; Bleicken 1975; Leuregans 1975; Kaser 1978: 111; Wieacker 1979; Ankum 1983; Aricò Anselmo 1983; and Kaser 1986.

10 See Aricò Anselmo 1983: 455, 461, 509–10 n. 117, 605; Kaser 1986: 9; and Ankum 1983: 533, 535; *contra*, Mülllejans 1961: 5–6, 18, 20–21, 29–34.

true, they thought, in both theory and practice.¹¹ Although for Plato, aristocratic rule by philosopher-kings supported by a guardian class was certainly the best regime in theory, an idea that he developed in the *Republic*, his *Laws* delineated in detail the next best regime (or what would be the best possible regime in general practice). In this later work, Plato made it clear that, while the former regime might never exist in any material way, the «second-best» type of state potentially could, in that it did not entail «a community of wives, children, and all property». In the *Laws*, the Athenian stranger describes this latter type of polity as appropriate for the ordinary sort of people who will make up his companion Megillus' new colony at Magnesia, not the «gods» or «children of gods» who would populate the city of the *Republic*.¹²

For Plato, legislation regulating divine worship is of critical importance, both for the polity in the *Republic* and for the one envisioned in the *Laws*. The *Republic*, however, leaves religious legislation *per se* to Apollo at Delphi and focuses on religious education,¹³ whereas the religious legislation in the *Laws* is more particular and conservative in character. According to the Athenian stranger, the future colonists should be convinced that their happiness depends upon their earnest pursuit of justice, which, in turn, emphasizes piety by taking God, not man, as their model.¹⁴ Such piety is achieved «through the reverence of gods, spirits, heroes, and ancestors» according to the forms of worship set out by oracles at Delphi, Dodona or Ammon, or by «ancient stories, visions, or divine inspiration». Regardless of their source, «the lawgiver should not tamper with these».¹⁵ The foundational character of divine worship defined in this way is further emphasized in book 10 which seeks to cultivate piety, in part by setting out and explaining grave punishments for various forms of impiety.¹⁶ Because this «second-best» regime reflects the cosmic order as much as possible, it embodies justice as much as possible, in that it strives to accord everyone his or her due.¹⁷ Impiety, accordingly, undermines the regime's foundation, whereas piety reinforces it.¹⁸ The gods may sometimes seem indifferent to us as individuals, in that there may be injustices at the level of the individual. Since such events can be a common cause of impiety (*Leg.* 10.899–900), citizens of this regime should be persuaded that the gods must still be allowed to govern (as their polity strives to do). When the gods govern, not only will the regime cultivate virtue (10.906), it will reinforce a cosmic system of justice, in that each soul after death will come to live in a region appropriate to its character.¹⁹

11 The other notable late third-century Neoplatonist is Iamblichus. His political philosophy is very close to that of Plotinus and Porphyry (see O'Meara 2003: 46–50, 53–55, 62–65, 87–106, 123–127), but because the context in which he developed them is still not well established, I will not discuss him here.

12 Plato *Leg.* 739a–740a (trans. Saunders throughout). See also O'Meara 2003: 35–36, 91–93. Even in the *Republic* (592), Glaucon suggests that the regime that they have been describing exists only «in words» and probably does not exist «anywhere on earth», to which Socrates adds that such a «pattern» may exist for the one «who wants to see and found a city within himself ... It doesn't make any difference whether it is or will be somewhere» (trans. Bloom throughout, sometimes modified).

13 Plato *Resp.* 427b–c; 376e–398b. See O'Meara 2003: 117.

14 Plato *Leg.* 716a–718a. See O'Meara 2003: 118.

15 Ibid. and Plato *Leg.* 738.

16 See also O'Meara 2003: 118–119.

17 *Resp.* 443b–c and 434c; *Leg.* 904. See also Sodano 1979: 58–59 n. 21.

18 Plato *Leg.* 889b–e. See O'Meara 2003: 118.

19 Cf. Stalley 1983: 175–177.

Plotinus published no commentaries on either Plato's *Laws* or the *Republic* – a circumstance that contributes to the impression that he eschewed political engagement.²⁰ Nevertheless, his treatise *Against the Gnostics*,²¹ written between 262 and 267 (during the reign of Gallienus),²² describes the contemporary Roman state in terms that evoke the regime described in Plato's *Laws*.²³ First, Plotinus distinguishes life in this world from a higher form of existence (*Enn.* 2.9.8), making clear that, because there is wealth and poverty, contemporary life is not regulated along the lines of the *Republic* (2.9.9). Next, he argues that the life of the 'good and wise' person (*spoudaios*) should be 'directed to the highest point and the upper region', while the life of 'the more human sort' of person (*anthrôpikôteros*), can take one of two forms: either the more human person can be 'mindful of virtue' and 'have a share in some sort of good' or s/he can be like the 'common crowd' who furnishes 'the necessities for the better sort' (2.9.9).²³ Speaking of the present regime in terms that evoke the polity in the *Laws* (904), Plotinus asks his opponents, some of whom, at least, were Christian,²⁴ 'how ... is it possible rightly to disapprove of a polity that gives each man his deserts? In this polity, virtue is honored and vice has its appropriate dishonour, and not merely the images of the gods but gods themselves look down on us from above, ... leading all things in order from beginning to end'. The one 'who ignores this', Plotinus continues, 'is one of the rasher sort of humans who deal boorishly with divine things' (2.9.9.19–27). In the present polity, he concludes, it is never wrong to praise the gods in their 'multiplicity', for that is how God reveals himself here (2.9.9.36–40).

Porphry of Tyre, like his mentor Plotinus, is generally not considered to have had a deep interest in political philosophy.²⁵ Indeed Porphyry is famous as Christianity's most serious and dangerous critic – a circumstance that led directly to the decree of 325 ordering the destruction of his anti-Christian writings and to the now fragmentary character of many of his works.²⁶ Nevertheless, some of these anti-Christian texts themselves suggest that Porphyry, like Plotinus and Plato, saw divine worship as having a foundational character in a proper state. For example, in his *Philosophy from Oracles*, Porphyry suggests that Christians are 'in every way impious and atheist' because they have 'apostatized from the ancestral gods through whom each *ethnos* and *polis* has come together (*sunestêten*)'. Like the Athenian stranger in the *Laws*, Porphyry suggests that such people are utterly irresponsible and deserve punishment, not pardon, for abandoning 'those who, for generations, among all Hellenes and *barbaroi*, throughout *poleis* and rural areas, in all holy places, sacred rituals (*teletais*) and mysteries are the subjects of theology for all emperors, lawgivers and philosophers'.²⁷

20 See O'Meara 2003: 3 and Jerphagnon 1981: 215–16.

21 For the date, see Porphyry *Vita Plotini* 5.

22 For Plotinus' favorable impression of Gallienus' regime, see Jerphagnon 1981: 216–221.

23 Trans. Armstrong throughout, sometimes modified.

24 Armstrong 1973; Guerra 2000; and Igal 1981: 138–9, 146 n. 7; *contra*, Rist 1996: 394. See Armstrong 1992: 123 for Plotinus' 'speaking for the whole Hellenic tradition' in this treatise, against the challenge of 'an alien kind of monotheism' that both Gnostics and mainstream Christians pursued. As Borodai 2003: 67 recognizes, it is less important to identify precisely which Gnostics Plotinus was addressing and whether they belonged to a self-identified group. Rather the treatise is significant for its objections to attributes common to a variety of groups which would include some philosophically-minded Christians.

25 Although Proclus (*In R.* 2.96) refers to Porphyry among those philosophers who have commented on the role of mythology in Plato's *Republic*, it is uncertain whether Porphyry wrote a commentary on the entire work. See Smith 1993: 206.

26 Constantine, 'To the Bishops and People', in Socrates *Hist. eccl.* 1.9.

27 Porphyry in Eusebius *Praep. evang.* 1.2.1–3 For attribution to Porphyry as well as a discussion of this passage as first a paraphrase and then a quotation, see Wilamowitz-Möllendorf 1900: 101.

Given the foundational character of divine worship for each type of political community, however, whether *ethnos* or *polis*, Hellenes or *barbaros*. Porphyry, like the Athenian stranger in the *Laws*, also sees divine worship as bound up with a polity's identity. In this way he approaches the concepts that Ulpian articulates in defining the *ius publicum*, that law regulating divine worship constitutes, in part, the foundation of the *res publica* and so is bound up with its identity.²⁸ Porphyry develops the link between religious law and political identity in the same fragment of the *Philosophy from Oracles* by asking whether Christians are 'Hellenes or *barbaroi*' or 'what might be between these' *ethnoi*. What is this 'foreignness (*xenos*) among' Christians and 'what is the revolutionary character (*neôterismos*)' of their 'way of life?' Further, he accuses his opponents of undermining the various religious communities of the empire by abrogating their laws and 'chew[ing] out for themselves' a 'new and solitary dead end'.²⁹

As we have seen, the notion that legislation regulating divine worship was a component of a polity's foundation and identity was pervasive in the third and early fourth century. Articulated by Ulpian and Porphyry alike, the concept provided the tetrarchy with a justification for persecution. Like Porphyry, the emperor Galerius had closely linked a people's traditional religious rituals with the integrity of their polity. Like Ulpian and Porphyry, Galerius had suggested that legislation concerning divine worship constitutes an elemental part of that polity's identity. In Galerius' edict too is the sense, implicit in Ulpian and explicit in Porphyry, that people deviating from a polity's traditional *sacra* might legitimately be punished. In drawing on Roman jurisprudence and Neoplatonist political theory to sanction laws calling for religious conformity, the tetrarchs clearly sought to achieve compliance through arguments that transcended simple and ultimately unpersuasive appeals to maintain the *pax deorum*. Such arguments carried weight because Christians – especially those increasingly counted among the elite – shared the view, at least according to Lactantius, that laws regulating worship constituted, in part, a community's foundation and identity.

4 Christianity, law and identity

Arriving in Nicomedia probably in 299, just as the regime was purging Christians from the army and court,³⁰ Lactantius witnessed not only the spread of the persecution to the population at large in 303 (*Div. inst.* 5.11.15), but also the emperors' efforts to justify this measure shortly beforehand (*Div. inst.* 5.2–4).³¹ Indeed, if Porphyry did speak at the court's behest, Lactantius would have been among the audience who heard him (*Div. inst.* 5.2). Motivated by the rhetorical and physical assault against his faith, Lactantius set out to justify Christian doctrine and practice in a work of seven volumes, aptly entitled *The Divine Institutes* (*Div. inst.* 5.4.1).³²

For the argument that this passage introduces Porphyry's *Philosophy from Oracles* and the anti-Christian character of the work, see Wilken 1997: 127.

28 Although Frezza (1968, 1983) has argued that Ulpian writes under Neoplatonist influence, his work is too fragmentary to tease out its sources clearly. It would probably also be more appropriate to view him within the context of Middle Platonism. See Honoré 2002: 82.

29 Eusebius *Praep. evang.* 1.2.

30 For the date, see Digeser 2004: 57.

31 For Lactantius' biographical details (such as they are), see Jerome's *De viris illustribus* 80.

32 This work survives in two editions, the first of which he wrote between 305 and 310. For the date, see Heck 1972 and Digeser 1994.

From the very start of the *Divine Institutes*, Lactantius indicates his desire both to take Ulpian as a model and to surpass him.

If certain *jurisprudents* and arbiters of equity have published *institutes of civil law*, ... how much better and right is it for us to follow them by putting divine institutes in writing ... so that we may silence death-bringing superstitions and very foul errors? ... Therefore, setting to the side the authors of this earth-bound (*terrenae*) philosophy who contribute nothing dependable, let us undertake the right path. For my part, if I thought that these men were satisfactory *guides to living rightly*, I would follow them myself.³³

Ulpian was unique for identifying jurisprudence as the 'true philosophy' in the introduction to his *Institutes*, the very introduction in which he had defined the *ius publicum*.³⁴ In criticizing the type of philosophy contained in the institutes of the jurisprudents, then, Lactantius is the first extant author to refer to the jurist's work.³⁵ Lactantius also indicates that the subject of his *Divine Institutes* should be distinguished from the concerns of institutes of civil law. Readers familiar with Ulpian's *Institutes* might have understood Lactantius to mean that his *Divine Institutes* took up concerns that Ulpian had identified with the *ius publicum*. For in the preface to his *Institutes*, Ulpian lists civil law as one of the concerns of *ius privatum* (Dig. 1.1.1.2). And if Ulpian's *Institutes* served as the model for Justinian, then they were concerned exclusively with *ius privatum*.³⁶ Accordingly, in distinguishing his *divine* institutes from civil law, Lactantius may be linking them to Ulpian's *ius publicum*.

Lactantius thus chose to respond to edicts of persecution, the aim of which was to return Christians to the ancient *sacra*, by writing a book that would instruct its readers in the principles of justice as they pertained to the public domain. Such a project implies that the legal foundation for the persecution rested, at least in part, upon the relationship that Ulpian had established between the *ius publicum* and *iures in sacra*. Lactantius provides further evidence for these connections in book 5 of the *Divine Institutes*, aptly entitled 'On Justice'. After railing against the character of the Greco-Roman gods, Lactantius complains (in words echoing Galerius' edict) that requiring their worship actually perverts Roman *disciplina* because Rome's leaders have modeled themselves after these bad characters (5.10.16–11.17–18).³⁷ Later, in terms that recall Ulpian's definition of the *ius publicum* and the edicts of persecution, Lactantius quotes those who say that such *sacra* must be defended because they have been publicly embraced (5.19.20).

Although Lactantius suggests that Ulpian's jurisprudence helped to legitimate the persecution, the Christian author actually shares with the jurist – and with Porphyry – the view that law concerning divine worship constitutes, in part, the foundation and identity of a political community. It is very clear that, for Lactantius, the *divina ius* upon which his own *Institutes* are based is the defining aspect of what he sees as the Christian polity; it is, in other words, a fundamental element of the Christians' identity as a people. Through Christ, in Lactantius' view, through this teacher of justice, as he calls him, God gave a new law for those who would worship him (4.13.1). For Lactantius, those who uphold Christ's

33 Lactantius *Div. inst.* 1.1.12–17.

34 Dig. 1.1.1.1. See Waldstein 1995; Schermaier 1993, and Crifò 1976b.

35 Ferrini 1894: 350.

36 Indeed the introductory paragraph to Justinian's *Institutes*, like the opening paragraph of the *Digest*, paraphrases the introduction to Ulpian's *Institutes* before identifying *ius privatum* as its concern (Justinian *Inst.* 1.1.1.4).

37 The four gods whom Lactantius singles out for criticism in 5.10.16, Jupiter, Hercules, Liber and Apollo, were the gods identified with the four members of Diocletian's tetrarchy, Diocletian, Maximian, Galerius, and Constantius, respectively. See Nicholson 1984.

law are a *populus* apart, for the law has been revealed to them and to no others. Accordingly only among this *populus* is justice to be found (5.15.1).³⁸ Lactantius' *Institutes*, then, quite clearly suggest in a Christian context that obedience to God's law, at least part of which pertains to religious observances, is part of what constitutes Christians as a people.

By articulating the foundational character that laws regulating divine worship had for the empire as a whole and for the various political communities within it, third-century jurisprudence and political theory not only grounded imperial legislation under the last pagan emperors, but it also provided a framework within which Christians themselves structured the role of law within their own community. This is a significant insight, for it helps explain how pagan emperors such as Diocletian and Galerius might turn to persecution, not out of a kind of knee-jerk superstitious traditionalism, but from a genuine conviction that Christians, who practiced their own rituals, worshipped their own God and followed their own law, did not support what it was to be 'Roman,' thus undermining the polity's foundation and identity. Moreover, this shared rhetoric indicates the extent to which certain Christians at least were willing to situate themselves within Roman juridical and philosophical traditions, even while claiming obedience to what they deemed a superior, divine law. Such a claim on Lactantius' part might be read as undermining whatever shared heritage the Christian apologist claimed for his community. Nevertheless, here too Lactantius shows, that he shares with Neoplatonists a belief in an eternal, transcendent law, not identical with the law of the state, obedience to which brought a person closer to the divine.

5 Law as a divinizing agent

The remainder of this essay will sketch out the Neoplatonists' conception of law as a divinizing agent within the polity, the evidence for which comes not only from their own texts, but also from Christian responses to them. Indeed Lactantius, while roundly rejecting their vision of the best possible earthly polity, nevertheless appropriated for himself important elements from the Neoplatonists, deploying them within his own system of thought. Because he wrote during persecution, however, Lactantius did not completely consider what a regime under a Christian sovereign would look like. Accordingly, it was left to Constantine to set out a notion of a Christian regime that was the mirror image, in many ways, of the best possible polity envisioned by the Neoplatonists several decades before.

6 The Neoplatonist view

Plotinus taught would-be philosophers that divinization, or assimilation to God, should be their overriding goal.³⁹ But once a philosopher had achieved union with the One, a different range of responsibilities opened up. 'Perhaps ... it was because Minos attained this kind of union that he was said ... to be 'the familiar friend of Zeus',⁴⁰ Plotinus says, 'and it was in remembering this [experience] that Minos laid down laws that were its images.'⁴¹ As

38 Cf. also 6.9 and 5.8.7 for use of the term *populus* to denote people subject to *divina lex*.

39 See, for example, Plotinus *Enn.* 1.2, together with Porphyry's *On Abstinence and Sentences*.

40 Citing *Od.* 19.178–179.

41 *Enn.* VI.9.7.22–26. See also Porphyry *Vita Plotini* 23.

O'Meara sees it, Plotinus thought such people should work with the centers of power to promote a political order whose legislation would be in the divine image.

Following Plato's advice in the *Laws*,⁴² Neoplatonists thought that the philosopher-lawgiver should ensure that a polity's legislation promoted virtue among its citizens. Not only would this benefit citizens by promoting justice, but also for some citizens it would facilitate their assimilation to God. For Plato, because the polity's laws had a divine foundation, the key to achieving these virtues was to pursue the forms of traditional piety promoted through the polity's legislation. This was a difficult goal. Quoting Hesiod, the Athenian stranger remarks that 'the road to vice is smooth ... but 'as the price of virtue' [Hesiod] says,

the gods have imposed the sweat of our brows; ... long and steep is the ascent that you have to make and rough, at first; but when you get to the top, then the rugged road is easy to endure.⁴³

Porphyry also linked traditional piety with the mastery of political virtue.⁴⁴ Moreover, he considered steps by which a person might be cleansed of physical pollution so that s/he could benefit from the traditional rituals that Plato had linked to the pursuit of virtue. Quoting an oracle of Apollo that echoes Plato's reference to Hesiod, Porphyry marvels at 'how much effort' it takes for a person to carry out the sacrifices required to purify the body, 'to say nothing of his finding the salvation of the soul'.⁴⁵ While piety helped a citizen follow the law and to master the political virtues, Neoplatonists also believed that the philosopher-lawgiver, as a law-abiding exemplar of virtue, could serve as a model for other citizens, keeping the community in line with its divine foundation.⁴⁶

For Neoplatonists, the organization of a soul imbued with political virtue is an image of the sensible world, and the sensible world, in turn, is a domain that Plotinus and Porphyry sometimes described in language appropriated from Hesiod's *Theogony*, as the realm of Zeus.⁴⁷ For the Neoplatonists, each polity cultivating political virtue through its laws is a unique reflection of Zeus' kingdom, brought into alignment through the efforts of the Platonist lawgiver, who, like Minos, had listened to the god's counsels. Insofar as they reflect the organization of the cosmos, the best polities, like souls endowed with the political virtues participated in the divine order.⁴⁸

For philosophers, people already fairly advanced in virtue (at least by the Neoplatonists' reckoning), the achievement of a well-ordered state facilitated their quest for divinization and perhaps even union with the One. This was achieved by practicing the 'purificatory' virtues, a distinction that sets the Neoplatonists apart from Plato.⁴⁹ When a philosopher had mastered the purificatory virtues he became an image of the relationship between the sensible and intelligible worlds in that his soul, an entity that could participate in the sensible world, was nevertheless held within the intelligible world. Plotinus likened this

42 Plato *Leg.* 711 and 733e; O'Meara 2003: chapter 2 and 91–93.

43 Plato *Leg.* 718e–719a; Hesiod *Works and Days* 287–92.

44 Porphyry *Chr. frag.* 1 Harnack in Eusebius *Praep.* 1.2 and *Sent.* 32.

45 Porphyry *Phil. or. frag.* 324 Smith. The oracle: 'The way of the blessed ones is steep and very rough, opening at the beginning to gates adorned with bronze. But there are infinite pathways that have arisen' Plotinus, too, believed that the 'good' person should acknowledge the existence of good spirits, the gods in this world, and the intelligible gods, for 'it is not contracting the divine into one but showing it in that multiplicity in which God himself has shown it, which is proper to those who know the power of God, inasmuch as, abiding who he is, he makes many gods, all depending on himself and existing through him and from him' (*Enn.* 2.9.9).

46 Porphyry *Plot.* 9, 12; *Vita Pyth.* 12, 17.

47 Porphyry frag. 438 Smith.

48 Plotinus *Enn.* 2.9.

49 Plotinus *Enn.* 1.2; Porphyry *Sent.* 32.

relationship, drawing upon Hesiod's legends, to Zeus's presence within Kronos before Zeus was born as part of the creation of the sensible world.⁵⁰ Plotinus sometimes also described Kronos as king of the intelligible realm, and as the son of Ouranos, an inexact metaphor for the One. This systematic mapping of Hesiod's three chief divine progenitors onto the three divine hypostases first appears with Plotinus.⁵¹ Using intellect to govern soul and soul to govern body, the philosopher, through virtue, makes himself an image of Intellect or Kronos. The realm of Intellect, Kronos' kingdom, embodiment of the 'Golden Age',⁵² is accordingly where such a philosopher's true citizenship involves him. Unlike the kingdom of Zeus, the sensible world, full of flux and change, and unlike the individuality of each polity constituted according to the program in the *Laws*, the kingdom of Kronos, the intelligible world, is a state in which all live in perfect justice and equality.⁵³ It is eternal, unchanging and universal since it is governed by Intellect and embraces the unchanging Forms. It constitutes the 'source and nature of justice', Plotinus claims.⁵⁴ The person who seeks this true justice, through the pursuit of the purificatory virtues, does so by following the divine law that embraces them. As following this law, by pursuing these virtues, is difficult, Porphyry encourages those seeking the intelligible realm to embrace its proper form of piety, making life a prayer to God, 'by inquiring into and imitating His nature'.⁵⁵

One should 'fly to our dear country',⁵⁶ Plotinus urged, suggesting that even in the best earthly realm, the philosopher lived as a kind of exile. Because Zeus is both king of the sensible world and always a child of Kronos held within the intelligible, Zeus, Plotinus says, is an infallible guide to the upper realm, a position that reinforces the role that a polity's laws play in the process of divinization.⁵⁷ Taking Zeus as a model, the philosopher too lived part in the sensible world and part in the intelligible world. Indeed, in Porphyry's description, Plotinus is a good example of one who lived simultaneously in both realms.⁵⁸ This existence in two spheres, in fact, is what makes the philosopher-lawgiver such a compelling guide for the polity and its citizens: because the intellectual part of his soul resides in the intelligible world, he can see the ideal form in every material thing.

50 Elsewhere, Plotinus uses the analogy of the perceptible house and the intelligible house: 'the perceptible house participates in arrangement and order, but There, in its formative principle [i. e., the intelligible house], there is no arrangement or order or proportion' because these appear only when form is extended into matter (*Enn.* 1.2.1.43 ff).

51 These metaphors work together with Plotinus' other reference to Hesiod's *Theogony* 453 ff. in his analysis of Soul as Zeus. Plotinus has perhaps drawn this analogy from Plato's own observation in the *Laws* (712e–714a): 'To name a proper *politeia* after what governs it, it should be a theocracy under the guidance of Kronos, the god who rules over men rational enough to let him. ... Kronos knew that human nature could not take control of human affairs without arrogance and injustice, so he appointed kings and rulers who were beings of a superior and more divine order. ... Where rulers are mortal we should imitate the life people led under Kronos as much as possible'. For Plotinus' distinctive use of this passage see Hadot 1981. For most Middle Platonists, Intellect was the first principle (Armstrong 1992: 119).

52 Plato *Leg.* 713 in describing the 'wonderfully happy life' over which Kronos presided when there was 'peace, respect for others, good laws, justice in full measure, and a state of happiness and harmony among the races of the world', is clearly referring to Hesiod's characterization of Kronos' golden age in *Works and Days* 110. This motif is implicit in Plotinus' notion that when Intellect presides there exists 'the true life of Kronos' (*Enn.* 5.1.4.10).

53 Hadot 1981: 43.

54 *Enn.* 5.8.10.

55 Porphyry frag. 346 Smith. See Armstrong 1992: 120–21 for the 'essential unity' of the metaphysics of Porphyry and Plotinus, together with Corrigan 1987; *contra*, e. g., Lilla 1987.

56 *Il.* 2.140.

57 *Enn.* V.8.10–13.

58 *Plot.* 12.

It is important to emphasize that Neoplatonists did not understand the path of virtue leading to divinization as a route open to all of a polity's citizens.⁵⁹ Rather, Neoplatonists conceived of the journey upward as a staged journey comprised of several paths. A citizen who had ascended the path of political virtue, however difficult it might have been, might not have a soul well-suited for the next stage of the journey. Indeed, as Augustine reports, Porphyry claimed that, although he had searched long and hard, *no doctrine* actually *offer[ed]* a universal way for the liberation of the soul.⁶⁰

Augustine, of course, believed that Christianity offered precisely this *via universalis*. Nevertheless, to the third-century Neoplatonists, philosophically-minded Christians presented a major source of impiety. To them, Christians were dangerous because their teachings jeopardized the potential divinization of the citizen body.⁶¹ Porphyry, for example, argued that Christians had made fundamental errors about the structure of the cosmos and the place of Jesus within it. These errors were so grave that they actually made potential salvation more difficult by more firmly cementing the soul to the body.⁶² In short, for the Neoplatonists, as Christians persisted in their impiety – the gravest crime in Plato's *Laws* (884–885) – their repeated lawlessness jeopardized the state's own law-based relationship with the divine and its ability to foster the divinization of its citizens.

7 Early fourth-century Christian views

Written in direct response to the pagan arguments that justified the legislation against Christian practice that initiated the Great Persecution, Lactantius' *Divine Institutes* strongly suggests that Neoplatonist thinking about law as a divinizing element of political society played an important role in this episode of legal reform. Lactantius indicates his familiarity with Neoplatonist political theory in his allusions to the Neoplatonists' three levels of divinity,⁶³ in his discussion of the paths of virtue, and in his suggestion that Christianity promotes the true divine law, allowing all adherents (not just philosophers) to experience the *real* Golden Age.⁶⁴

Throughout the *Divine Institutes*, although Lactantius is unwilling to grant that names like *Caelus*, *Saturn*, and *Jupiter* could refer to any more transcendent powers, his very preoccupation with these deities as well as certain characteristics which he dismisses as *inappropriate* to them indicate that Lactantius is aware of how Neoplatonists have used these names as metaphors for their three divine hypostases. For example, in considering whether the world is *governed by the power of one god or many* (1.3.1), Lactantius invokes the *testimony* of Orpheus in order to prove the oneness of God (2.5.2). After quoting the poet's characterization of God as the *first-born* appearer, son of *enormous air*, who *founded for mortals an imperishable home*, Lactantius says that these terms are *inappropriate* for Jupiter because he was Saturn's son. Nor are they appropriate for Saturn, son of Caelus. And, Lactantius continues, Orpheus *did not dare to set up Caelus as a sort*

59 See Clark forthcoming. I am very grateful to Prof. Clark for sharing this article with me on its way into press.

60 Frag. 302 Smith.

61 *Enn.* 2.9.5 f. Although directed at Christian Gnostics, Plotinus' objections here would also apply to more mainstream Christian teaching.

62 Porphyry fragg. 286, 297, 301a, and 344–346 Smith.

63 On the Neoplatonist trinity see O'Meara 2003: 37 and Hadot 1981.

64 Following Perrin 1978, most have seen Lactantius as a struggling Middle Platonist, ignorant of Plotinus' corpus. See also Rist 1996: 412 n. 37.

of first god because he could see that Caelus was a part of the universe [i. e., as *heaven*,] and that it needed a creator itself.⁶⁵ In considering these three deities as candidates for the one god, Lactantius names in Latin form the Neoplatonists' three hypostases: Ouranos as the First,⁶⁶ Kronos, Intellect, its offspring, and Zeus, Soul and son of the Intelligible – a characterization unique in that period to Plotinus' school (*Enn.* 5.8.10–12).⁶⁷ Indeed, Lactantius deconstructs the Neoplatonist trinity by forcing the names of the gods to represent elements of the sensible, material world.

Lactantius is equally aware of the Neoplatonists' use of Kronos and Zeus. In asking whether we *are ... really to think that [Saturn] ate his sons just because people say so*, Lactantius hints at the role that Kronos (or Saturn) plays in Plotinus' system. Indeed, as we saw, Plotinus conceived of the Intellect as full of *his offspring*, the forms,⁶⁸ which is why calling it *Kronos* was so apt. Similarly, Lactantius rejects the possibility that Zeus might be the creator of the sensible world, which is his role in Neoplatonist cosmology.⁶⁹ And Lactantius is aware of arguments that Minos, having been supposedly guided by Zeus, might serve as a model for future legislative reform (*Div. inst.* 1.22.3).

Lactantius further alludes to Neoplatonist political theory in his discussion of the path of virtue. First, Lactantius establishes that *there are two ways over which ... human life might progress; one leads to heaven, the other presses down to hell*. The philosophers knew that, *The way marked by virtues was arduous and difficult at the first approach, but that if anyone should come to its summit ... he would have a smooth way for the rest of his journey* (*Div. inst.* 6.3.1–2). The allusion to Hesiod here refers not simply to the poet, but also to the way this passage from *Works and Days* was used by Plato in the *Laws* and by Porphyry.⁷⁰ Lactantius reinforces this allusion by describing the *heaven-bound* way as *difficult, steep, and rough* (6.4.6–7), and by remarking that these virtues were directed toward the body and *to this life which we spend on earth* (9). Indeed, this is a serious problem with the way that philosophers have conceptualized the path of virtue, Lactantius says.⁷¹ They have also erred, he claims, by restricting the pursuit of the higher levels of virtue to just a few. Christianity, however, provides access to the divine for all, Lactantius believes. For him it is the true path *which the philosophers seek but they do not find* (*Div. inst.* 6.8.1) – a clear allusion to Porphyry's search for a path to the divine that would indeed be open to all a polity's citizens.

Lactantius rejects the traditional piety that was the foundation of the best polities on earth, and he berates the *philosophers* for restricting pursuit of the heaven-bound law to a few (*Div. inst.* 3.25.4–5). Nevertheless, Lactantius describes the Christian polity under God's divine law in terms strikingly similar to the Neoplatonists' description of the Intelligible realm as the Golden Age of Saturn. This aspect of the *Divine Institutes* is the clearest evidence that Neoplatonist political theory was deployed in the context of the Great Persecution and that Lactantius is aware of and has borrowed heavily from it.

In Lactantius' version of salvific history, the ancient Hebrews, the Christians' *ancestors* (*Div. inst.* 4.10.5), participated in a primordial justice, founded on monotheistic piety. Like the rest of humanity, however, they fell away from monotheism (*Div. inst.*

65 Lactantius *Div. inst.* 1.5.7: *Caelum autem tamquam deum primum constituere non audebat, quod videbat elementum esse mundi, quod ipsum egerit auctore.*

66 *Enn.* 2.9.1: Referring to the One: *we call it the first in the sense that it is the simplest.*

67 See Hadot 1981.

68 *Enn.* 5.5.3 and 5.8.12.

69 *Div. inst.* 2.5.1: *quae utique omnia non Iuppiter fecit.*

70 See above, pp. 12–13.

71 Cf. *Div. inst.* 5.14.18–19; 6.3.5; 4.23; 7.1; 8.1, 4.

4.10.7–11) and their descendents became the Jews (4.10.14). Sending Christ, God ultimately «turned away» from the Jews (4.11.7), in Lactantius' telling, but in so doing, restored justice to earth – at least for a few. Christ, whom Lactantius portrays in philosophical garb, wearing the tunic and pallium (4.18.8), restores justice like the Neoplatonist philosopher-lawgiver by communicating to humanity a new law (4.17.6–7) that fosters monotheistic piety (4.11.7).

Life under divine law inculcates the virtues that lead to heaven. Like justice within the Platonist system, «justice» for Lactantius «embraces all the virtues at the same time» (5.14.9). There are, however, two virtues that Lactantius thinks God's law cultivates in particular, piety and *aequitas* (*Div. inst.* 5.13.9). Piety Lactantius defines as «simply the knowing of God»; *aequitas* is «leveling oneself with everyone else». Since piety consists in «knowing God», it is cultivated by giving God «integrity of the mind ... praise and a hymn»,⁷² practices similar to those Porphyry defined for the intelligible realm, in that they involve no formal rituals or material sacrifices.⁷³ Lactantius' conception of *aequitas* also has overt links to the Neoplatonists' conception of life lived under the divine law of Intellect or Kronos, in that «equalizing self with other» promotes a Golden Age.⁷⁴ «How happy and how golden would be the condition of human affairs», Lactantius says, «if throughout the world gentleness, and piety, and peace, and innocence, and equity, and temperance, and faith, took up their abode! ... nor would there be any need of prisons, or the swords of rulers, or the terror of punishments» (5.8.8–9). Lactantius clearly believes that the Golden Age he visualizes under the divine law of God does not describe the present Roman polity. Nevertheless, he exhorts Christians – those already living under the divine law – to «be fair and good, and the justice which you seek will follow you of its own accord ... that golden time will return for you» (*Div. inst.* 5.8.3). Echoing the Neoplatonists' belief that people pursuing the higher realm, cultivating the purificatory virtues can live in their «native» realm of the intelligible while physically «exiled» in the realm of the sensible,⁷⁵ Lactantius argues that «the species of that golden time [has] returned ... but was assigned only to a few» (5.7.2).

Lactantius, I think, deliberately used the language of the Golden Age in describing the Christian community living under the divine law of God in order to draw an overt comparison between the Christian polity and the realm of the intelligible conceptualized by the Neoplatonists. Further evidence that this is Lactantius' intention exists in his comparison of the law of Moses with what he considers to be the divine law of God. For Lactantius, the law of Moses is an image of the true divine law, enigmatically embodying the «true precepts of justice» that Christians (who know the divine law) alone can see.⁷⁶ Here Christians play an analogous role to Neoplatonist philosophers in their ability to find what is «true» within an image of the intelligible world. «All the precepts of the Jewish law», Lactantius argues, «look toward the working of justice because they were given enigmatically, so that through the figure of carnal things, the spiritual things might be understood» (4.17.21). Here the unique polity delineated by Moses' law has the same relationship to the realm defined by divine law as the unique polities Grafted by lawgivers under Zeus' inspiration have to the realm of Kronos.⁷⁷ In short, Lactantius rejects the

72 *Div. inst.* 6.24.27–25.12.

73 See above, p. 14.

74 See above, p. 14, for *aequitas* as a characteristic of the reign of Kronos.

75 See above, pp. 13–14.

76 *Div. inst.* 4.20.1: According to Lactantius, Christ «opened up to his disciples ... the meaning of the Sacred Scripture, that is, the secret messages of the prophets, which were not able to be understood in any way at all before they were opened up ...»

77 Cf. 5.8.6–9.

notion that the Roman polity, even with the guidance of a Neoplatonist philosopher could possibly be the best regime in practice – a stance made clear in his references to the tetrarchs as *tyranni* or usurpers (5.12.1). Instead, Lactantius sees the Jewish community under Moses' law as fulfilling this preparatory role.⁷⁸

It seems very likely that Lactantius has developed this legal and political understanding of Christianity in response to contemporary challenges from Neoplatonist philosophers – not simply Plotinus, but Porphyry, as well. Further evidence for the role that the Neoplatonists played in this discussion about the divinizing character of certain kinds of law in certain polities comes from Eusebius, who, as Jeremy Schott has so ably demonstrated, also construes the law of Moses as the image of the divine in Neoplatonist terms.⁷⁹ It is unlikely that two Christian authors, each unknown to the other, one writing in Latin, the other in Greek, would have used a Neoplatonist framework to articulate the relationship between Jewish and Christian law, if they were not indeed responding to a common Neoplatonist source.

Lactantius left his position shortly after the emperors issued their general edicts of persecution and departed from Nicomedia several years later.⁸⁰ His next known post was in Trier, as tutor to the emperor Constantine's son, a post that he may have assumed as early as 310 while his patron ruled a portion of the western empire as a member of Galerius' imperial college.⁸¹ Evidence suggests that Lactantius read his *Divine Institutes*, which he had dedicated to Constantine, to the court at Trier.⁸² The western emperor proved receptive to some of the ideas that Lactantius developed in this work,⁸³ and this includes Lactantius' Neoplatonist-inspired vision of Christians as the citizens of a heavenly polity. Constantine, however, appropriated Neoplatonist political thought even more thoroughly. For in describing Christians as the link between the polity and the divine, he gave them the very same role within the community that Neoplatonist political theory had envisioned for its own practitioners. Conveying a sense that Christian law was equivalent to true justice, Constantine argued that the judgment of Christian priests, at least in certain instances, «should be regarded as if God himself were in the judge's seat. For these have no power either to think or to judge except as they are instructed by Christ's teaching». ⁸⁴ It would seem, in fact, that Constantine understands the Roman Empire under his leadership to have achieved the same relationship between the best possible earthly polity and the heavenly polity that the Neoplatonists had recently advocated in advance of the Great Persecution.⁸⁵ The Roman Empire under Constantine is not synonymous with the heavenly polity, for the two systems of law are not identical: the traditional cults, for example, have not been

78 On this topic, see also Jacobs in this volume.

79 Schott 2003.

80 Barnes 1973.

81 Digeser 1997.

82 Digeser 1994.

83 For Lactantius' influence on Constantine see Digeser 2000, especially chapter 5. It may well be that Constantine's legislation, now preserved in the *Theodosian Code*, also conveyed the concepts that Lactantius developed from Ulpian and the Neoplatonists regarding the foundational role of religious legislation, but they would most likely have been expressed in the preambles which were discarded by the Code's compilers (*Gesta Senatus Urbis Romae* 4).

84 Optatus *App.* 5.

85 The ability to conceptualize his role as Christian monarch in this way may have even made Constantine more of a Neoplatonist than Lactantius. For although Lactantius believes that Christ's revelation is necessary for people to find the path to God, Constantine is certain that «accurate apprehension by a healthy mind and by sight itself rises in a single impulse of true virtue to the knowledge of God» (*Edict to the Eastern Provincials*, Eusebius *Vit. Const.* 2.48).

outlawed.⁸⁶ Nevertheless, the presence of Christians within the Roman community, who, like the Neoplatonist philosophers, live both in the heavenly and in the earthly polities, ensure that the laws of the earthly realm can divinize the citizen body. This divinization (or salvation, in Christian terms) comes about because Christians (like the Neoplatonist philosophers) not only serve as the guardians of the polity's laws, helping them conform to true justice, as we just saw, but also as exemplars of virtuous behavior: 'It may be, Constantine hopes, in words that echo Lactantius and the Neoplatonists, 'that this restoration of equal privileges', after Licinius' defeat, 'will prevail to lead [those who are not Christian] to the right path'.⁸⁷ This is because, he asserts, 'those alone will live a holy and pure life, whom you call to rely on your holy laws'.⁸⁸ Like the Neoplatonists, while following the laws of the earthly polity can be the first stage in preparing a soul for the path to the divine realm, for Constantine true divinization is open only to those who live by the divine law. For the Neoplatonists these were those (generally philosophers) cultivating the purificatory virtues; for Constantine (as for Lactantius) these are the Christians.

Constantine's vision, at least from a Christian perspective, is profoundly optimistic for it sees Rome under its Christian emperor as divinizing all of its citizens because, through the leadership and example of the Christians within it, the polity is aligned – so far as possible – with the divine law of God's heavenly city (whose citizens Christians already are). Although by the end of the fourth century, Augustine decided to step back from this position, his engagement with both Neoplatonist and Christian political theory indicates the foundational role that both played in the century between the persecution and the Germanic attacks on Rome and Carthage.

8 Augustine's break with the past

Although the conventional view is that Augustine's vision of the two cities is informed neither by Lactantius nor by Neoplatonism,⁸⁹ it seems clear that he developed it in response to these positions. Like Lactantius, Constantine, and the Neoplatonists, Augustine believes that the citizens of the heavenly city live physically intermingled with the citizens of the earthly polity. But unlike Lactantius and Constantine, Augustine is less sanguine that all who call themselves Christian are indeed members of the heavenly city on earth (*De civ. D.* 1.35; 11.1). Like Lactantius and Eusebius, Augustine asserts that the 'commonwealth' of the Hebrews was 'consecrated to prefigure and fore-announced the city of God', but that the path to this heavenly city was revealed only when 'came the Mediator Himself in the flesh' to 'more openly' explain the New Testament 'in conformity with the relations of the ages of the human race' (10.32; 19.23). Augustine even follows Lactantius and Eusebius in arguing that the Law of Moses was an image of the divine law (19.23). Like that of the

86 See *Edict to the inhabitants of Palestine*, Eusebius *Vit. Const.* 2.56: 'Let those in error, as well as the believers, gladly receive the benefit of peace and quiet. For this sweetness of fellowship will be effective for correcting them and bringing them to the right way. May none molest another; may each retain what his soul desires, and practise it. But persons of good sense ought to be convinced that those alone will live a holy and pure life, whom you call to rely on your holy laws. Those who hold themselves back, let them keep if they wish their sanctuaries of falsehood. To us belongs the shining house of your truth ... This we pray also for them, that by means of the general concord they too may enjoy what they desire'.

87 See also Constantine's letter to Alexander and Arius, Eusebius *Vit. Const.* 2.67.

88 *Edict to the Eastern provincials*, Eusebius *Vit. Const.* 2.56.

89 See O'Meara (2003), 154–158.

Platonists, Augustine's heavenly city is 'composed of holy angels and blessed spirits' (11.7; cf. Plato *Resp.* as described in Plato *Leg.*); its citizens 'live after the Spirit, not after the flesh' (14.9). It is the Platonists' ideal city, insofar as 'the soul ... rules the body and reason the vices in the rightful order', both in the 'individual just man' and in 'the community and people of the just'. But it also recalls Lactantius' heavenly realm since the just 'live by faith which works by love, that love whereby man loves God as he ought to be loved and his neighbor as himself' (19.23). Because Augustine believes, however, that the 'two cities have been formed by two loves: the earthly by the love of self, even to the contempt of God, the heavenly by the love of God, even to the contempt of self' (14.28), he completely decouples the relationship that the Neoplatonists and Constantine had posited between a good earthly polity and the heavenly realm. The earthly realm could never point to the heavenly, so long as people of whatever sect 'did not obey the command of God'. For Augustine the earthly realm cannot point to the heavenly realm (in the way that the Neoplatonists and perhaps Constantine envisaged) because even if 'the soul may seem to rule the body' and 'reason rule the vices', which is the goal of a polity structured according to Plato's *Laws*, 'if the soul and reason do not themselves obey God, as God has commanded them to serve Him, they have no proper authority over the body and vices'. Rule by the intellect, in Augustine's system is not enough: in his view, even the rational/intellectual faculty of the soul in command of the body is not necessarily obedient to God (19.24–25).

At the beginning of the fourth century, Christians and pagans were seemingly at an impasse. Pagans, drawing on Platonist philosophy and Roman jurisprudence argued that laws regulating religious ritual were fundamental to the identity of the Roman polity. Christians agreed, but used such concepts to argue for the legitimacy of their own communities in the face of Roman coercive power. In effect, the Christian argument validated the pagans' fears that Christian exclusivism and 'lawlessness' was tearing at the fabric of their political community. At the same time, Neoplatonist philosophers, while believing that – with their guidance – political communities might set all citizens on the proper path toward divinization, also believed that only a select few were able to follow the divine law that inculcated the piety and virtue that brought souls closer to God. In response, Lactantius created a Christian political theory that borrowed heavily from the Neoplatonists in casting Christians as members of the heavenly realm, while rejecting the notion that the Roman state as presently constituted could ever be an image of the divine, much less a path toward divinization.

This analysis of pagan and Christian views regarding the relationship between religion and Roman law shows why a regime attentive to Neoplatonist philosophy and the tradition of jurisprudence ultimately turned to persecution in an effort to enforce religious conformity. This policy did not bring the uniformity that its proponents sought. On the contrary, it left the door open to Constantine's accession and ultimate achievement of sole rule. Under his reign both pagans and Christians might think that the earthly Roman regime upheld the laws that undergirded their political communities. By the time of Augustine, this optimistic vision was no longer tenable in the West. Nevertheless it continued to thrive in the East through Justinian's sixth-century reign. For his regime not only produced the greatest compendium of Roman law and jurisprudence ever assembled, in which Ulpian's definition of *ius publicum* survived to dictate the scope of Justinian's *Institutes* and influence subsequent European law, but his reign also continued to promote the tenets of Neoplatonist political theory.⁹⁰ Clearly the appropriation by Christians of the framework

90 O'Meara 2003: 171–184; referring the anonymous dialogue *On Political Science* edited Mazzucchi 2002 (2nd edition).

pagans had used to understand the relationship between law and religion survived to shape the Byzantine polity for centuries to come.

Chapter 5

«Papinian Commands One Thing, Our Paul Another»: Roman Christians and Jewish Law in the *Collatio Legum Mosaicarum et Romanarum*

by

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1 Introduction: Religious Identity and the Law in Late Ancient Christianity

«So now then you should know that your own laws, which seem to rouse toward innocence, are borrowed from divine law, which is more ancient in form. For we have already spoken of the age of Moses».¹ The invocation of Roman and Christian law here in Tertullian's *Apologeticum* («legal defense») gestures in two directions simultaneously. There are the overtones of hostility and superiority: Roman magistrates, who insist that «the laws are supreme in their own domain»,² should realize that the roots of their own legal mentality do not run as deep as the biblical foundation of Christianity (*divina lex*). At the same time, there is an undertone of conciliation: Roman justice is, after all, «borrowed» (*mutuatas*) from that divine law, and Christians daily prove their fidelity to the institutional apparatus of the Roman state: «We are always praying for all the emperors: long life for them, secure Empire, safe house, strong armies, faithful Senate, honest people, a world at peace – whatsoever are the wishes of human and Caesar».³ The pre-Constantinian Christians hovered in this shadowy margin between accommodation and condemnation, appealing to and critiquing the Roman law that might condemn them to death.

Although the fourth-century legalization of Christianity drastically altered the position of Christians «in the world», we still find Christians locating their sense of simultaneous identification with and alienation from the Empire (increasingly *their* Empire) in the decisive sphere of civil jurisprudence. The acid-tongued ascetic Jerome observes a critical moral gap between God's law and the Empire's:

The laws of the Caesars are one thing, those of Christ another; Papinian taught one thing, our Paul (*noster Paulus*) taught another. Among *them* the reins of shame are relaxed for men ... Among us, what is not permitted to women is equally not permitted to men and the same servitude is decreed by an equal condition.⁴

1 I would like to thank Catherine M. Chin of the Catholic University of America and Clifford Ando of the University of Southern California for their perceptive readings of a draft of this essay. Tertullian, *Apologeticum* 45.4 (CCL 1:159). All translations from original sources are my own. See also *Apol.* 19.5* (CCL 1:120). On the date of the *Apologeticum* (c. 197) see Barnes 1971: 32–4, 55.

2 Tertullian, *Apol.* 1.3 (CCL 1:85).

3 Tertullian, *Apol.* 30.4 (CCL 1:141). See also *Apol.* 32.2 (CCL 1:143): «We respect the judgment of God in the Emperors, who has set them (*praecepit*) over the nations».

4 Jerome, *Ep.* 77.3 (CSEL 55:39). The emphatic *noster Paulus* explicitly distinguishes the Apostle

Commenting here on the permissiveness of Roman divorce law over against New Testament strictures,⁵ Jerome finds the distinction between «us» and «them» especially manifest in the discontinuity of legal and moral codes. Other ecclesiastical voices in the first decades of a Christian Empire echo his disjunctive sentiments.⁶

Just as in the time of Tertullian, however, legal discourse opened up for post-Constantinian Christians an ambivalent space in which rejection of and rapprochement with the state's social institutions coexisted. Jerome, so quick to malign the laxity of Rome,⁷ famously enacted his own cultural ambivalence through a juridical fantasy. In a widely circulated (and notorious) letter to his virgin companion Eustochium,⁸ Jerome recalled a haunting vision from his youth in the monastic wilds of Syria: «I was dragged before the Judge's tribunal (*tribunal iudicis*) ... Asked my status (*condicio*) I replied that I was Christian. But he who presided (*ille qui praesidebat*) said: «You lie, you are a Ciceronian, not a Christian!»⁹ As one scholar notes, «the dream also presents Jerome to himself as a battleground, and again his body is the locus ... a clash of cultures, one secular and the other religious».¹⁰ The «clash of cultures» is only seemingly resolved in this nightmare court when Jerome renounces «the books of gentile literature»;¹¹ in reality, the tension remains inscribed throughout the rest of Jerome's highly cultured oeuvre.¹²

As the martyr's court of Tertullian and the heavenly tribunal of Jerome attest, the discourse of Roman law was a fertile imaginative ground for the articulation of ambivalent loyalties. Already from the time of the Republic, Roman law was a formative aspect of cultural identity, tied directly to the education of its upper classes; in the period of the Empire, law continued to play a crucial role in the rhetorical construction of individual and communal identity within the bounds of the Roman Empire.¹³ The late ancient Empire was a complex and inherently fractious political entity, lacking the kind of «native» coherence that traditionally bounded an *ethnos* or *populus* in the ancient world. This is not to say that Romans lacked a sense of ethnic or cultural identity – *Romanitas* or *Latinitas* – only that it was not this «native» identity that held together their mighty Empire. *Latinitas* never

from another famous third-century jurist, Julius Paulus; it also implicitly draws a connection between the «laws of Caesar and Christ».

5 Matt 19:9: «And I say to you, whoever divorces his wife, except for unchastity, and marries another commits adultery». See Evans Grubbs, 1995: 225–60; and Clark 1998: 233–55, esp. 235–37 on Roman law and Christian ascetic exegesis.

6 Ambrose of Milan, governor-turned-bishop, likewise finds in the law a point of division between Church and Empire: see McLynn 1994: 298–303. Yet Ambrose, too, could also emphasize the univocity of Christian and Roman law: see *Ep.* 58.3.40–44 (*CSEL* 82.2:114), discussed in Evans Grubbs 1995: 154.

7 Jerome speaks with particular disgust about the wedding of a couple in Rome who had between them already accrued some forty-two spouses: *Ep.* 123.9.1–2 (*CSEL* 56: 82–83), discussed by Clark 1995: 356–57.

8 See now Adkin 2003.

9 Jerome, *Ep.* 22.30.4 (*CSEL* 54:190). As Adkin 2003: 292–93, points out, much of the language of Jerome's dream/vision alludes to the accounts of martyrs before Roman judges, particularly the confession *Christianus sum* that sealed the martyrs' fates.

10 Cox Miller 1993: 40.

11 Jerome, *Ep.* 22.30.5 (*CSEL* 54:191). Adkin 2003: 283–85, 295–97, argues that historians (following Rufinus's lead: see n. 12 below) have misunderstood the point of this anecdote by focusing on Jerome's (fantastic) «renunciation» of secular literature.

12 As tartly noted by Rufinus, Jerome's enemy in the Origenist controversy (early fifth century CE): *Apologia contra Hieronymum* 2.7 (*CCL* 20:88); discussed by Lardet 1993: 123–27.

13 On the production of imperial ideologies of autocracy and consensus embedded in late Roman legislation, see Harries 1999: 214–16; on «law» (in a strict literal sense and a broader moral sense) as a unifying force in the Roman Empire, see Ando 2000: 47–48.

became the Roman equivalent of Alexander's *hellenismos*, a tool of cultural unification that (ostensibly) unified an empire.¹⁴ The logic of Roman imperial identity derived from its ability to hold together by institutional force its diverse constitutive elements, the provinces stretching from Spain to Armenia. Economic, military, and (increasingly throughout the third through sixth centuries)¹⁵ jurisprudential institutions forged those boundaries apart from shared ethnic, linguistic, or cultural patrimony. Provincials (and, to a degree, non-elite Romans) under «Roman Law» were constituted in the same gesture as members of an imperial body politic and subordinates to that body. The result was a sense of identification with Rome that was partial and incomplete.

The Christian imagination was likewise split between rejection of and accommodation to the Roman Empire, a split identity made more acute as the Empire became increasingly Christian. These oscillating discourses of rejection and appropriation of «Rome», incipient in Tertullian's writings and more insistent by the time of Jerome, are often read as a sort of necessary schizophrenia attendant upon Constantine's conversion: despite an authentic distaste for «the world» and its secular institutions, Christians «had to» come to terms with their new position in that world. Yet we can also explain this double-edged attitude toward Rome as part and parcel of the institutional formation of subjects under the Roman Empire: a split identification with Rome (benevolent dispenser of laws) and alienation from Rome (ruthless imposer of laws). Christians, already having internalized various contradictory attitudes toward «Caesar» from their sacred Scriptures and communal histories, engaged the institutions of Empire with similar ambivalence: drawing connections to and distinctions from the institutional face of Roman Empire.¹⁶

In order to explore more thoroughly this doubled logic of Roman Christian identity in the imaginative terrain of legal imperial discourse, I examine here an idiosyncratic late ancient legal text that «has baffled scholars since its first publication ... in 1573»,¹⁷ the *Collatio Legum Mosaicarum et Romanarum* (likely titled in antiquity simply the *Lex Dei*).¹⁸ The text presents series of Roman laws organized under headings of legal prescriptions from the Pentateuch, providing a comparison (*collatio*) of the two legal realms. Recent studies ascribe the text to a Jewish *collator*¹⁹ forcing the *Collatio*'s significance into the margins of the late ancient Christian Roman Empire. Here, however, I would like to approach this idiosyncratic work from the vantage point of the ambivalent and legalistic articulation of Christian cultural identity in late ancient Rome: a religious selfhood that seeks identification with and triumph over «Rome» through gestures that are, perhaps ironically, best described as imperial.

In fact, I would suggest that this document's seeming Jewishness, so compelling to modern scholars, illuminates more clearly those shadowy attempts of Christians to come to

14 Of course the workings of «hellenism» from the classical period through late antiquity, functioned in a highly complex manner: see Bowersock 1990; Swain 1996; and Goldhill 2001.

15 That is, from the period of the great *iurisconsulti* through to the time of the compilation of the Codes of Theodosius II and Justinian, an age arguably ushered in by the *constitutio Antoniniana*'s grant of universal citizenship in 212 CE: see Honoré 2004; and Garnsey 2004.

16 See Clark 1991.

17 Comment of Rutgers 1995: 210; Volterra 1930: 39 labels it a «misterioso documento»; Liebs 1987: 163 calls it a «merkwürdige Werke».

18 Liebs 1987: 163, suggests the original title was «*Lex Dei, quam Deus praecepit ad Moysen, et Lex Romana*», based on medieval attestation and manuscript evidence, and by analogy with Cassiodorus' *Institutiones divinarum et saecularium litterarum*.

19 As one recent general study notes without much comment: «der Verfasser war wohl Jude». Noethlichs 2001: 200. Noethlichs relies mainly on Rutgers and Cracco Ruggini 1983 for this statement.

terms with their new imperial roles. I have argued elsewhere that one strategy by which Christians devised a new imperial ideology for themselves was through doubled gestures of rejection and appropriation of Jews and Judaism in the holy land.²⁰ These strategies for constructing and colonizing Jewishness often resulted in contradictory attitudes of fear and desire familiar to modern theorists of ideology and empire. The same convoluted strategies at play in the imperial context of the holy land may also be at work in the juridical alignment of Roman and Christian cultural values. In an examination of the cultural tangle of the *Collatio*, we can perhaps witness how Christians could manipulate the authority and antiquity of a biblical 'Law' (ambiguously coded, as we shall see, as 'Jewish Law') in a double gesture of triumph *over* Rome ('We have already spoken of the age of Moses', Tertullian boasted) and triumph *as* Rome ('We are always praying for the emperors', he adds). Through the curious compilation of Mosaic and Roman legal systems, the appropriation, or even colonization, of Jewish Law becomes the intertwined authority of Christian *iudex* and Roman *iurisconsultus*.

2 'Misterioso Documento': scholarly framing of the *Collatio*

The *Collatio*, which likely survives in an incomplete state,²¹ presents sixteen *tituli* of Mosaic prescriptions from four books of the Pentateuch (Exodus, Leviticus, Numbers, and Deuteronomy) followed by one or more citations from Roman jurists or legal codes.²² Modern scholars often mine the *Collatio* as a source of pre-Justinianic and pre-Theodosian Roman jurisprudence,²³ or to fill in some of the bombastic moral rhetoric stripped away from the laws by the compilers of the later Codes.²⁴ Basic questions of the *Collatio*'s provenance and purpose remain highly debated.²⁵ The quality of the correlation between the biblical and Roman laws has been questioned, as well as the source of the biblical text that lies at its foundation.²⁶ The date of compilation also remains unsettled. Since the first external attestation does not come until the ninth century,²⁷ dating is generally argued from internal points: laws promulgated under Constantine seem to set a *terminus post quem* of

20 Jacobs 2004.

21 I cite text of the *Collatio* from Riccobono 1968: 543–89. English translation with photoplates of the oldest (Berlin) codex and Latin transcription in Hyamson 1913.

22 On the incomplete state of the text see Volterra 1930: 122 and Rutgers 1995: 218; for a breakdown of the Biblical and Roman legal sources, see idem, 214, 234–5. The legal sources are the *Codex Hermogenianus*, *Codex Gregorianus*, and five jurists: Ulpian, Papinian, Paulus, Gaius, and Modestinus (see Tellegen-Couperus 1993: 150–56 for dates). As Rutgers 1995: 214, points out, these are the five jurists whose opinions were granted automatic authority in the 'Law of Citations' of 426 CE (*Codex Theodosianus* 1.4.3; text in Mommsen 1954: 1.2:34–35).

23 As by Evans Grubbs 1995: 100, on an imperial edict by Diocletian against close-kin marriage preserved in *Collatio* 6.4 (*FIRA* 2:558–60). See also similar recent use by Bradbury 1994: 135 n. 60.

24 Both Evans Grubbs and Bradbury use the *Collatio* as a legal source that preserves the 'moralizing tendency' (Bradbury 1994: 135) and 'self-righteous wrath' (Evans Grubbs 1995: 101) of Diocletian's legislation.

25 Despite the assurances, originally expressed in 1944, of Daube 1991: 1: 107–22, that the 'great mystery of the *Collatio legum Mosacarum et Romanarum* can be regarded as solved' (107).

26 See for example Ostersetzer 1934: 'Beaucoup de prescriptions romaines ne correspondraient nullement aux passages cités de l'Écriture si nous n'interprétions pas ces derniers dans un sens tout à fait spécial' (78); the 'special sense' for Ostersetzer is rabbinic literature. Volterra 1930: 54–80, on the other hand, notes lexical changes in the Latin made precisely to conform the biblical law to Roman statutes.

27 See Hyamson 1913: xiii–xv.

315 CE,²⁸ while lack of mention of the *Codex Theodosianus* seems to establish a *terminus ante quem* of 438. The inclusion of a law promulgated under Theodosius between 390 and 392 would seem to set a further plausible *terminus post quem*,²⁹ but several scholars have chosen to view this paragraph as a later interpolation or redaction.³⁰ In recent years scholars have argued for a very early date in the fourth century,³¹ while others have pushed the composition of the *Collatio* well into the 390s.³²

Discussion continues as to whether the author was Jewish or Christian (and, if Christian, whether a specific personality could be identified).³³ The text has no prologue and precious few non-legal lines of text from which to extrapolate an author's voice or context.³⁴ Most of the debate over religious milieu therefore centers on the purpose of the text. Particularly useful on these questions in recent years, is the analysis of the historian of Judaism Leonard V. Rutgers. Most of Rutgers' important work on Jews in late ancient Rome focuses on the abundant, yet understudied, material record (archaeological and epigraphical). In arguing the Jewish provenance of the *Collatio*, Rutgers seeks to supplement the much sparser literary remains of Roman Jews. By determining that the author (or compiler) was Jewish, Rutgers can claim that 'the *Collatio* was the last major Jewish apologetic work to be written in antiquity'.³⁵ Rutgers' treatment of the *Collatio* is not only recent and comprehensive, but also brings into play several of the issues I too wish to address through this text: the nature of religious identification with and alienation from 'Rome', the cultural contexts of textual production and consumption, and the role of 'the Law' in Jewish and Christian self-definition.³⁶

Rutgers asserts that 'once the *Collatio* is placed within the larger framework of Jewish and early Christian attitudes towards the Torah, there can be little doubt that the author of the *Collatio* was Jewish'.³⁷ First Rutgers briefly rehearses the *argumenta e silentio*: there is no reference to any text of the New Testament in the *Collatio*, nor any 'trace of an allegiance to or even a knowledge of Christianity'.³⁸ Next, Rutgers asks whether a Jew or

28 *Collatio* 14.3.6: 'ex novellis constitutionibus' (*FIRA* 2:578).

29 *Collatio* 5.3.1–2 (*FIRA* 2:557).

30 Volterra 1930: 52; Barone-Adesi 1992: 185–93, who sees several layers of redaction spanning the fourth century.

31 For the various arguments see Barone-Adesi 1992: 9–18. See also Cervenca 1963: 253–276; Masi 1965: 415–32; and finally Rabello 1984, who asserts 'the *Collatio* was compiled by a Roman Jew between 294 and 313, with the purpose of broadening the Jews' knowledge of Roman law during Diocletian's reign' (158).

32 Rutgers 1995: 249–50, provides the most detailed argument for a date in the 390s.

33 For a summary of the arguments, see Rutgers 1995: 210–11, 218–19. Most scholars have been convinced by the close textual reading of Volterra 1930, that the compiler was likely Jewish, although see Liebs 1987: 162–74. Christian nominations include Rufinus, Ambrose, Jerome, and the author known as Ambrosiaster: see Cracco Ruggini 1983: 39–41 n. 4.

34 Note, however, that Barone-Adesi's conclusions also rest on his analysis of the few 'annotazioni' (*Collatio* 5.3, 6.7, 7.1, 14.6 [*FIRA* 2:557, 561, 562, 578]) that pepper the text: Barone-Adesi 1992: 178–84. His conclusions (concerning Jewish authorship) are similar to Rutgers', although it seems the two worked independently.

35 Rutgers 1995: 252.

36 It goes without saying that I find Rutgers' work immensely important for the history of ancient Judaism: the fact that I have chosen him as my interlocutor for this particular text should be taken as a sign of respect for his work, while highlighting productive discussions ongoing in the field of ancient Jewish-Christian relations.

37 Rutgers 1995: 211.

38 Rutgers 1995: 236. Other studies push this argument from silence much further, such as Rabello 1984: 157, who states baselessly, 'there is no known Christian document that does not mention the Gospels'. Even granting that Rabello means to say 'the New Testament', this assertion is

Christian would have more interest in «the Law» (the Pentateuch) in fourth-century Rome. He notes that, perhaps influenced by heightened interest in Paul's letters (especially his letter to the Romans in the Latin West),³⁹ Christians evinced little active interest in the Mosaic Law apart from the moralized Ten Commandments: the rest of the Law was hopelessly «Jewish», part of that stereotypical package comprising Sabbath, circumcision, and *kashrut*.⁴⁰ Rutgers extrapolates from this disinterest that «no early Christian author ... would ever have taken a selection of regulations belonging in the second law to determine the structure of the specific argument he has in mind».⁴¹ To cite such laws positively, even productively in the service of religious self-definition, Rutgers argues, would have seemed like distasteful «Judaizing».⁴² By contrast, Jewish authors of earlier periods (here Rutgers must of necessity rely on the first-century CE writings of Flavius Josephus and Philo of Alexandria, and to a lesser extent the rabbis) show an intense interest in the practical application of Mosaic legal materials that would have been unusual among Christians.⁴³

Finally, Rutgers inquires after the most plausible social context from which the *Collatio* might have emerged in the fourth century.⁴⁴ Rutgers believes that the concerns of a culturally marginalized, yet socially embedded, Roman Diaspora Jewish community provide the «most convincing» explanation for the purpose of the document:

The *Collatio* was composed to stress the primacy of Mosaic law and to show that the injunctions of Mosaic law were not at variance with the ordinances of Roman law ... The *Collatio* was written by a Jew (or Jews) and the decision to include or exclude Roman legal materials from it rested on apologetic considerations alone.⁴⁵

This is the double-edged *apologia* familiar from Tertullian, perhaps, and written in similar circumstances: a marginalized and even threatened religious group invokes its own legal superiority even as it emphasizes juridical rapprochement with its imperial masters.⁴⁶ Here in the fourth century, however, Jews struggling under a Christian Empire have taken the

either impossible (no Christian author ever wrote without mentioning the Christian Bible?) or unhelpfully tautological (no document is categorized as «Christian» unless mention is made of the Christian Bible?).

39 On the rise of «Pauline studies» in late antiquity (particularly of the letter to Romans in the West, and that to the 1 Corinthians in the East), see Martin 2000: 238–42 and notes; Wiles 1967: 3–13; Grazia Mara 1992; Dassman 1992: 657–9; and Mitchell 2000: 66–7.

40 Rutgers 1995: 233: «[F]ulfillment of the Law in the sense used by Jesus [see Matthew 5:17] was taken to mean observance of the Decalogue only ... Except for occasional stereotypical references to Jewish religious holidays, circumcision, or the laws regarding food, legal materials other than the Decalogue did not really interest early Christian writers». On these standard stereotypical signs of Judaism, see discussion in Cohen 1999: 39–49.

41 Rutgers 1995: 235.

42 Rutgers 1995: 234–36. Rutgers employs the *Biblia Patristica* and the index of the critical edition of Ambrosiaster's *Liber quaestionum* (CSEL 50) to construct an analytic table demonstrating the sparseness of Christian citations of the Pentateuch verses employed by the *collator*.

43 Rutgers 1995: 240. While no comparable table is provided for Jewish citations of the specific biblical passages found in the *Collatio*, such a table would no doubt prove unnecessary: it is certain that Josephus, Philo, and the *tannaim* referred with much greater frequency to the particular legal commandments of the Torah than did the Church Fathers.

44 Much of this argument is now supplemented by Lucrezi 2001: 34–38. Like Rutgers, Lucrezi relies heavily on the 1930 work of Edoardo Volterra («grande Maestro italiano» [22]).

45 Rutgers 1995: 247–48, 250.

46 Lucrezi 2001: 40–45 and 131–32, adopts Volterra's argument (Volterra 1930: 119) that the text emerges «di fronte alla polemica cristiana» and «di difesa da parte degli Ebrei contro le accuse dei Cristiani», and suggests Rutgers supports this argument. Rutgers, however, suggests a more complicated context in which Christian influence on Roman law was beginning to disadvantage Roman Jews.

earlier place of Christians under threat of pagan proscription.⁴⁷ Rutgers points to one of the few authorial comments of the *Collatio*: «you should realize, jurists, that Moses established [this law] first».⁴⁸ Although Tertullian may have boasted at the end of the second century, «We have already spoken of the age of Moses», such a contention (Rutgers insists) now makes more sense in the mouths of Diaspora Jews than in those of Christians who have already triumphed over Rome. The legalistic purpose and apologetic context signal, for Rutgers, an authorship securely located in Roman (or western Diaspora) Judaism.⁴⁹

3 «Consona Voce Damnavit»: reconsidering the *Collatio* and Christianity

Few recent scholars have mounted a more confident argument for the Jewish context of the *Collatio* than Rutgers.⁵⁰ But some of his points (as even he recognizes) are more convincing than others. Arguments from silence, for example, are relatively unreliable: while the *collator* makes no effort to acknowledge the existence of Christianity, making it difficult to positively infer Christian involvement in the production of the text,⁵¹ the document was preserved and transmitted by medieval Christians. It was clearly not impossible for later Christian readers to find the text useful despite the absence of Christ's name.⁵² In addition, Rutgers' numerical study of the Old Testament texts used in the *Collatio* provides some grounds for his conclusion that, as a group, these biblical passages were less likely to appeal to a Christian than to a Jew.⁵³ I might even concede the likelihood that a Jew (or Jews) originally compiled the legal materials in the *Collatio* were I only asking, «Who might be more likely to come up with this specific list of biblical legal texts?»

Of course, Rutgers' overarching argument also deals with the cultural environment in which the *Collatio* makes the most sense. For Rutgers, seeking to illuminate the shadowy world of late ancient Diaspora Judaism, the *Collatio* speaks to precarious social status and Jewish *apologia*. Yet I would suggest that the *Collatio* makes as much sense in the context of Christians puzzling over their cultural and social affiliation with the Empire and «the world». Furthermore, I would suggest that the absence of specific Christian markers, and the seemingly Jewish (or even Judaizing) emphasis on «the Law», might actually signal a

47 The question of Jewish legal disadvantage under the Christian Empire continues to be debated, although it seems clear that Jews empire-wide came under increasing legal notice from Christian emperors (for both good and ill) than from their non-Christian predecessors: see Schwartz 2001: 186–92.

48 *Collatio* 7.1 (*FIRA* 2:562): «scitote, iuris consulti, quia Moyses prius hoc statuit.» The legal comparison made here is to the Twelve Tables, making this a particularly pointed assertion of Mosaic primacy over Roman law.

49 Lucrezi 2001: 128–29, disputes the argument of some interpreters (such as Barone-Adesi) that the text had a «practical» application in Jewish or even Roman courts, and proposes instead an «internal» apologetic purpose (131).

50 His arguments are also among the most solid. Lucrezi 2001: 123–25, for instance, mounts clever, but somewhat chimerical, arguments based on the Latin of the *Collatio* (he believes it is an original translation [an expansion of a suggestion by Volterra 1930: 86] thus more likely done by a «learned Jew» [ebreo colto]) and the lack of chapter and verse numbers for biblical citations (which he claims also bespeaks a Jewish origin).

51 Barone-Adesi 1992: 178, 184, also argues from silence that «il compilatore» avoids mentioning the «imperatore catholico» (Theodosius I) and the «primo imperatore cristiano» (Constantine) in the laws of *Collatio* 5.3.1 and 14.6 (*FIRA* 2: 557, 578).

52 A point made by Liebs 1987: 165, 170, 174 and dismissed by Rutgers 1995: 239 and Rabello 1984: 157–58.

53 Rutgers 1995: 234–35.

very particular Christian mode of cultural production designed to further the complex interpenetration of Roman *saeculum* and Christian *sanctum*.

I believe that Rutgers has, on the one hand, underestimated the «decalogical» nature of the biblical citations in the *Collatio* and, on the other, underestimated the deployment of the (even problematically «Jewish») Law in the service of Christian ideology. Rutgers asserts that the *Collatio* cites biblical laws well beyond the «safe» Christian boundaries of the Decalogue, including passages that elsewhere drew the attention of Jewish writers. A closer look at the *Collatio*'s structure allows us to nuance this assertion. The sixteen surviving *tituli* of the text cover: 1. manslaughter (*de sicariis*); 2. assault (*de atroci iniuria*); 3. cruelty of masters (*de iure et saevitia dominorum*); 4. adultery (*de adulteriis*); 5. illicit sex (*de stupratoribus*); 6. incest (*de incestis nuptiis*); 7. theft (*de furibus et de poena eorum*); 8. false witness (*de falso testimonio*); 9. witness of relatives (*de familiaris testimonio non admittendo*); 10. theft of deposit (*de deposito*); 11. cattle-raiders (*de abactoribus*); 12. arson (*de incendiariis*); 13. moving boundary stones (*de termino amoto*); 14. kidnapping (*de plagiariis*); 15. astrology, sorcery, Manicheism (*de mathematicis, maleficis et manichaeis*); 16. inheritance (*de legitima successione*). As Edoardo Volterra pointed out, the legal connotation of the cited Mosaic regulations is often determined by the Roman laws placed in «parallel» to them.⁵⁴ Mosaic Law provides the structure for the *Collatio*, but in a juridical dialectic with the Roman laws it is compared with.⁵⁵

Other scholars have also pointed out that, by reading the Mosaic legislation more explicitly through its Roman parallels, it is possible to categorize the first fourteen *tituli* with little difficulty by means of the second half of the Decalogue (Exodus 20:13–17): homicide, adultery, theft, false witness, and desire for neighbors' possessions.⁵⁶ Titles 1–3 concern manslaughter and ancillary crimes (*homicidium*);⁵⁷ titles 4–6 treat adultery (understood in the Roman legal sense as the sexual disruption of marriage, thus including crimes like incest and *stuprum*);⁵⁸ title 7 treats theft;⁵⁹ titles 8–9 treat inappropriate testimony;⁶⁰ and titles 10–14 treat the appropriation of the property of «neighbors» (as

54 Volterra 1930: 83–86.

55 As Lucrezi 2001: 118, points out: «Ma scopo dell'autore ... non era solo quello di *illustrare* una somiglianza [between Roman and Jewish Law], ma anche, in qualche modo, di *crearla*» (emphasis Lucrezi's).

56 Observed by Hyamson 1913: xxx–xxxi; Liebs 1987: 170–71, esp. 171 n. 56 on «andere frühe christliche Rechtsaufzeichnungen ... nach dem Dekalog geordnet»; Barone-Adesi 1992: 177.

57 Compare *Collatio* 1.4.1 (*FIRA* 2:545): «Homicida est, qui aliquo genere teli hominem occidit mortisue causam praestitit»; 2.7.1 (*FIRA* 2:550): «Causa mortis idonea non videtur, cum caesus homo post aliquot dies officium diurnae vitae retinens decessit nisi forte fuerit ad necem caesus aut letaliter vulneratus»; 3.2.1 (*FIRA* 2:551): «Servus si plagis defecerit, nisi id dolo fiat, dominus homicidii reus non potest postulari» (emphasis added).

58 See Evans Grubbs 1995: 205–25. Compare *Collatio* 4.2.1 (*FIRA* 2:553): «Brevem interpretationem legis Iuliae de adulteris coercendis facturus per ipsa capita ire malui ordinemque legis servare»; 5.2.1 (*FIRA* 2:557): «Paulus libro sententiarum II sub titulo de adulteris ...»; 6.3.3 (*FIRA* 2:558): «Sed qui vel cognatam contra interdictam duxerit, remisso mulieri iuris errore ipse poenem adulterii lege Iulia patitur» (emphasis added). Reading *titulus* 5 as part of a range of proscriptions on adultery and unlawful marriage seems more reasonable than understanding it in terms of «pédérastie» (as Ostersetzer 1934: 77).

59 Perhaps the most self-evident: compare *Collatio* 7.5.1–2 (*FIRA* 2:563): «Furti quocumque genere damnatus famosus efficitur. Fur est qui rem alienam contrectat» (emphasis added).

60 Compare *Collatio* 8.3.1 (*FIRA* 2:564): «Hi, qui falso vel varie testimonia dixerunt vel utrique parti prodiderunt, aut in exilium arguuntur aut in insulam relegantur aut curia submoventur»; 9.3.1 (*FIRA* 2:566): «Suspectos testes et eos vel maxime, quos accusator de domo eduxit vel vitae humilitas infamaverit, interrogari non placuit» (emphasis added). Title 9 actually cites the ninth commandment (*Exod* 20:16) (*FIRA* 2:565).

distinct from the commandment against «theft».)⁶¹ Titles 15 and 16, on magic and intestacy, are more difficult to fit into this Decalogue framework, and might be better understood if the *Collatio* were complete.⁶² Nevertheless, the correspondence between the first fourteen *tituli* and the second half of the Decalogue is striking, especially in light of Rutgers' observation that «the only legal material from the Hebrew Bible that really attracted their [i. e., Christians'] attention were the Ten Commandments».⁶³ We can plausibly read (most of) the *Collatio* as a rewriting of the Decalogue using material from elsewhere in the Pentateuch, reshaped through collation with Roman law. It might be the case that seemingly extraneous («Jewish») legal material from elsewhere in the Torah is being drawn away from a practicable Jewish sphere (*halakah*) into the safer orbit of the (Christianized, moralized) Decalogue, through the intervention of Roman statutes. We could therefore read the *Collatio* as a Christian attempt to seize exegetical control of the mass of legal materials even at that moment being reinterpreted and put into practice by some Jewish religious authorities.⁶⁴ The additional force of Roman law, in this scenario, serves to naturalize the colonizing operation of a crafty Christian *collator*.

Of course, such a crafty textual operation would be subtle at best, and still risk the widespread fear of «Judaizing» that hovered around cultural and theological debates between Christians in this period.⁶⁵ What of Rutgers' broader claim that positive attention to the practical application of the «Law» ran against the grain of Christian thought in late antiquity, and that «legal materials other than the Decalogue did not really interest early Christian writers»?⁶⁶ Such an evaluation of Christian attitudes towards «the Law» relies on a broad range of writers ranging from the second through sixth centuries,⁶⁷ and risks homologizing very diverse formations of Christianity. We can return to the multifaceted authors with whom I began this essay, Tertullian and Jerome, each of whom left a significant corpus (not all of which is extant). When Rutgers cites Tertullian and Jerome, he focuses primarily on their readily available anti-Jewish interpretations of «the Law».⁶⁸ We

61 In title 10 the «neighbor» (*proximus*) is introduced in the Mosaic regulation (from *Exod* 22:7, 8, 11; *FIRA* 2:567), fixing the nature of the stolen «depositus» in the subsequent Roman laws. Title 11 distinguishes degrees of neighborly covetousness: *Collatio* 11.5.1 (*FIRA* 2:571): «Qui bovem vel equum errantem quodue aliud pecus abduxerit, furem magis eum quam abactorem constitui placuit.» Arson is further marked as «covetousness» in title 12: *Collatio* 12.4.1 (*FIRA* 2:573): «Incendiarii, qui quid in oppido praedandi causa faciunt, facile capite puniuntur.» Compare also *Collatio* 13.3.2 (*FIRA* 2:577): «Quod si per ignorantiam aut fortuito lapides usus causa furati sunt ...»; 14.3.5 (*FIRA* 2:578): «Eiusdem legis capite secundo tenetur, qui alieno servo persuaserit, ut dominum fugiat quive alienum servum invito domino celaverit vendiderit emerit dolo malo, quive in ea re socius fuerit ...»

62 One possible solution would be to correlate them to the second commandment, which treats idolatry in the context of «inheritance»: «You shall not make for yourself an idol, whether in the form of anything that is in heaven above, or that is on the earth beneath ... for I the Lord your God am a jealous God, punishing the children for the iniquity of the parents, to the third and fourth generation of those who reject me.»

63 Rutgers 1995: 235–36.

64 Lucrezi 2001: 131 and n. 43, emphasizes the educational zeal of Roman Jewish communities and even refers to «famous rabbinic schools» in Rome in the «early centuries of the common era», citing Rutgers for support. See, however, Rutgers 1995: 203–9, for a more nuanced assessment of the Talmud testimonies.

65 See, for some trenchant examples and references, Newman 2001.

66 Rutgers 1995: 233.

67 At one point he demonstrates a «general tendency in Christian thought» by citing Aphrahat (a Persian writing in Syriac in the 360s), Gregory of Nyssa (a Cappadocian writing in Greek in the 370–90s), and Gregory the Great (the Bishop of Rome writing in Latin in the 590s): Rutgers 1995: 223.

68 Rutgers 1995: 220, 231.

have already seen both Jerome and Tertullian betray a notable ambivalence in their rhetorical strategies for reconciling (or detaching) Christian identity from «Rome»; should we be surprised to find a similar double-edged discourse at work in their writings on «Jews» and the «Law»?

Tertullian, for example, is indeed dismissive of Jewish adherence to the Law in some writings (Rutgers cites heavily from Tertullian's treatise *Adversus Iudaeos*).⁶⁹ Yet he can also, in other contexts, become the Law's ardent defender. In his lengthy treatise against Marcion, the second-century Christian who distinguished the Creator God of the Old Testament from the Savior of the New Testament, Tertullian argues vociferously against Marcion's sloppy and inaccurate segregation of «Law» and «gospel». Tertullian does not merely recuperate the Jewish Law through «spiritualizing» exegesis, a common enough tactic among ancient Christians and one that Rutgers suggests contributes to their disregard for the systematic application of the Law. Against Marcion, Tertullian insists on the real (and, suggestively, continuous) benefits of adherence to the Jewish Law.⁷⁰ After citing some of the moral precepts of the Law (primarily from the Decalogue), Tertullian praises the humanitarian practice of freeing slaves and fallowing of fields;⁷¹ the restraint of violence engendered by the *lex talionis*; the frugality and austerity found in adhering to dietary laws of *kashrut*;⁷² even the sacrifices and ceremonies that served (serve?) to keep Jews from falling into idolatry.⁷³ Jerome's attitudes towards Jews, their Law, and their customs are even more complex and convoluted than Tertullian's, as I and others have detailed elsewhere.⁷⁴ It is unlikely that any figure from late antiquity wrote as many negative statements about Jews and the Law while simultaneously defending himself against charges of theological and cultural «Judaizing» leveled due to his transmission of Jewish language and culture.⁷⁵ Positive evaluation of the «Jewish» Law in late antiquity was not restricted to its practitioners. Often Christians appropriated the validity of the Jewish Law in order to craft Christian identities that walked a careful line between Christian self and Jewish other.

69 Rutgers 1995: 220–21.

70 This section of Tertullian's *Adversus Marcionem* bears comparison with Origen, *Contra Celsum* 5.25–50 (SC 147:74–144), a lengthy excursus on the uniqueness and praiseworthiness of Jewish Law in comparison with the particular laws of various nations.

71 An example of clemency also adduced by Origen, *Contra Celsum* 5.43 (SC 147:126), upon which Origen exclaims that, had the Jews not conspired against their own prophets and Jesus, the value of their Law was such that «we would have in them a model of the heavenly city (*poleōs ouranias*), which Plato himself strove to describe».

72 Pace Rutgers 1995: 224 n. 64, this argument should be distinguished from more strictly allegorical or typological Christian reading of dietary laws. Tertullian is not saying that abstention from certain foods *symbolizes* moral restraint, but that the actual practice of dietary restriction *engenders* moral restraint, an argument not appreciably different from a philosophical (and «ob-servant») Jew such as Philo.

73 Tertullian, *Adversus Marcionem* 2.17.4–19.4. Text in Evans 1972: 1:134–40.

74 See Jacobs 2004: 56–100 and the references there.

75 As Jerome famously exclaimed, when defending himself against charges of «Judaizing» the Scriptures, «If it is expedient to hate any people and to detest any nation, I have a notable hatred for the circumcised ... Yet can anyone object to me for having had a Jew as a teacher?» (*Ep.* 84.3.3 [CSEL 55:125]).

4 Two Tablets, Twelve Tables: Ambrosiaster on the law

We can see this doubled attempt at distancing and appropriation of Jewish Law in the writings of another figure, close to the cultural environment of the *collator*. «Ambrosiaster» (as scholars have dubbed the unknown author) wrote in Latin in Rome near the end of the fourth century, and is notable for his attention to the *minutiae* of (pagan) Roman life as well as Jewish beliefs and customs.⁷⁶ His detailed responses to the *pagani* and *Iudaei* (which extend far beyond his explicit chapters *adversus paganos* and *adversus Iudaeos*) have even led modern scholars to posit that he is either a converted pagan or a converted Jew, operating on the theory that no zeal matches the zeal of a convert.⁷⁷ For Rutgers, Ambrosiaster emerges as a star witness for «Why is the *Collatio* not a Christian Work?» I suggest that we can see in Ambrosiaster's conflation of «law» – Christian, Roman, and Jewish – a triangulation of Christian identity actually comparable to that of the *Collatio*: pushing the boundaries of the «Christian» decalogue, creating an ambivalent relationship between «divine Law» and Roman law, and (perhaps) appropriating the Jewish valorization of the Law in its broadest sense.

Ambrosiaster's *Liber quaestionum* arranges issues from Christian history and theology according to references from the Old and New Testaments,⁷⁸ a biblicizing procedure for outlining religious selfhood already suggestive of the *Collatio*.⁷⁹ The figure of Moses and «his Law» appears not infrequently in questions from both testaments, and «the Law» in all of its manifestations (Roman, Jewish, Christian) appears with great frequency.⁸⁰ At times, as Rutgers points out, Ambrosiaster is at pains to distinguish the contemporary practice of «the Law» by the Jews from the grace and moral Law (equated with the ten commandments) given to all. In *quaestio* 44, traditionally known as «*adversus Iudaeos*»,⁸¹ Ambrosiaster dismisses the validity of Old Testament Law, which has been supplanted by the New, «since it is not from the Law that one is made righteous.»⁸² The Law of which the Jews boast, for Ambrosiaster, was merely a punitive stopgap to keep the children of Israel in line until God could transfer grace to the gentiles.⁸³

When the «Law» is validated by Ambrosiaster, it is frequently (again, as Rutgers points out) in reference to the moral precepts of the Decalogue, which «may not be transgressed and are a guide to good life». ⁸⁴ He declares, «Thus says the law», and then quotes the entire

76 Souter 1905; see discussion of Ambrosiaster's religious identity in Rutgers 1995: 212.

77 On the Jewish Ambrosiaster, see the summary of arguments in Speller 1982. On the pagan Ambrosiaster, see Souter 1905: 166–74.

78 For instance somewhat systematic theological questions like «*Quid est Deus?*» are placed according to a sense of «fit» with the biblical narrative (this question is placed at the head of the *questiones veteri testamenti* as a scriptural prelude to Genesis-oriented «*Cur Deus mundum fecerit?*»).

79 Ambrosiaster has also left a commentary on the thirteen Pauline epistles (there is no commentary on Hebrews, assumed to be Pauline in the fourth century), much of which overlaps substantively and verbatim with the *Liber quaestionum*. On the genre of «question and answer» used by Ambrosiaster, see Bardy 1933, Volgers and Zamagni 2004. It is impossible to know to what extent all of these questions were «really» asked in Ambrosiaster's day (especially since we know so little about the author himself), but this uncertainty is, in some ways, even more productive: we are gaining a window into a kind of interior Christian monologue on issues of identity.

80 See Souter 1905: 27–31 and 178–79, which overlaps with Cumont 1903: containing an appendix (437–40) on «L' Ambrosiaster et le droit romain».

81 Ambrosiaster, *LQ* 44.1 (CSEL 50:71). A prefatory citation of Isaiah 56:7 provides the scriptural «hook» that places this chapter among the *veteris testamenti quaestiones*.

82 Ambrosiaster, *LQ* 44.5 (CSEL 50:73–74).

83 Ambrosiaster, *LQ* 44.4 (CSEL 50:73).

84 Ambrosiaster, *LQ* (appendix novi testamenti) 75.5 (CSEL 50:470); see also *LQ* 7.1, (appendix novi testamenti) 19 (CSEL 50:31, 436), and Rutgers 1995: 229.

Decalogue, concluding, 'Can these matters be said to have ceased? Far from it! Indeed, without them how could anyone be able to be judged as proper even in this life?'.⁸⁵ The Ten Commandments for Ambrosiaster are the *lex divina* and the *lex naturalis*, precepts given by God through Moses to guide humankind not only to the next life, but in this one, as well. This is an expansive reading of the function of the Decalogue in Ambrosiaster, perhaps comparable to the expansion of the Decalogue found in the *Collatio* itself.⁸⁶

This expansive reading of the Decalogue also allows Ambrosiaster – again, in an ambivalent fashion similar to the *Collatio*⁸⁷ – to bring Roman and 'divine' law into congruence.⁸⁸ For Ambrosiaster, the *lex naturalis*, the Decalogue, was of such fundamental ethical importance that some of its precepts are found in the laws 'among the Romans'. He plays with the multiple meanings of 'Law' in his reading of two passages from Paul's Letter to the Romans, in which 'the apostle calls the law given by Moses 'holy' and 'just' and 'spiritual' (Romans 7:12, 14), while at the same claiming that 'the law brings wrath; but where there is no law there is no violation' (Romans 4:15).⁸⁹ Ambrosiaster assures the reader that

when I say 'the law' [in the negative sense in the second passage], this is not that same law which is natural – for certainly the Romans were within that law, which certainly was fetched back from Athens by ten men having been sent (and two after them), as it is written in the two tablets [*sic*] which are hidden in the Capitol.⁹⁰

The implication is that the Romans, as a civilized nation, already practiced to some extent the ethical precepts of the Decalogue (the 'natural law') when Paul wrote to them. In fact, the 'natural law' is inscribed in their most ancient institutional jurisprudence (the Twelve Tables, referred to here), dating from the days of the early Republic.

At times, Ambrosiaster's 'Law' also escapes its decalogical bounds as he strives to wrest biblical Law in its entirety away from the Jews. While Ambrosiaster notes that Christ specifically came to free 'sinners' from that noxious burden of the ritual Law,⁹¹ elsewhere he appropriates all of the 'Law' for the work of Christian salvation apart from the Jews. In discussing the giving of the tablets of 'the Law' on Mount Sinai, Ambrosiaster manages to remove the Jews from the chain of legal reception entirely. Moses did not bring the Law down from the mountain for the Hebrews at all, since 'the Law was given against sinners

⁸⁵ Ambrosiaster, *LQ* 69.4 (*CSEL* 50:120).

⁸⁶ It is also worth noting that Ambrosiaster includes 'maleficium' under the 'mala contra eundem spiritum, qui est lex dei', providing a context in which the mysterious *titulus* 15 of the *Collatio* (*de mathematicis, maleficis, et manichaeis*) might make sense with the other, more clearly 'decalogical' precepts: *LQ* (appendix novi testamenti) 52.1 (*CSEL* 50:446). See n. 62 above. On Ambrosiaster's antipathy toward astrology and sorcery, see Souter 1905: 31–33.

⁸⁷ Such ambivalence between religion and law likewise lies at the heart of Lucretius's study of the *Collatio*'s *titulus* 3 (*de iure et saevitia dominorum*), 'dai quali emerge divergenza assai più che convergenza' (Lucretius 2001: 118).

⁸⁸ Despite the negative comparison of 'pagan' and Christian law found in *LQ* 114.9–11 34 (*CSEL* 50:307–8), in a chapter traditionally titled 'Adversus paganos.' Indeed, the negative and positive juxtaposition of Roman and Christian 'law' recalls similar ambivalence from Tertullian and Jerome, noted above.

⁸⁹ Ambrosiaster, *LQ* (appendix novi testamenti) 75 (*CSEL* 50:468).

⁹⁰ Ambrosiaster, *LQ* (appendix novi testamenti) 75.2 (*CSEL* 50:468). This is a slightly garbled account of the mission to Athens transmitted by Livy 3.31.8–33.7 (*LCL* 2:104–8). Ambrosiaster may be drawn to Livy's mention here of the codification of 'sacred law' ('*sacrae leges*': 3.32.7 [*LCL* 2:108]). A similar reference is made, with an additional explicit connection to the Law 'of the Hebrews' (*ex Hebraeis*) in Ambrosiaster's *Commentarius in epistolam ad Romanos* 7:1 (*PL* 17:105C–D).

⁹¹ Ambrosiaster, *LQ* 69.3–4 (*CSEL* 50:119–20).

(*contra peccatores*)' and Moses found the children of Israel sinning in idolatry (cf. Exodus 32).⁹² When he smashed the two tablets, this signified the rejection of the Hebrews and foreshadowed 'another people in the future, to whom the Law given on the mountain would be of use'.⁹³ These 'future people' are the nations of the gentiles, the true recipients of both the Law of Moses and the grace of Christ.

The 'Law' is also greater than the sum of its commandments, moral and ritual: it also includes the sacred history of God's people, from which the 'veil' has been lifted by the advent of Christ.⁹⁴ In a more schematic mood, Ambrosiaster affirms the 'tripartite' nature of the Law: rules pertaining to God, rules pertaining to man (these first two comprise the Decalogue), and the 'empty' and moot superseded commemorations (Sabbaths, new moons, circumcisions) of the Jews.⁹⁵ Yet elsewhere, with more subtlety, he can speak of the entire Law as 'two-fold' (*duplex*): without Christ (and for the Jews), it is harsh and full of punishments and burdens (*sententiae et onera*); with Christ, it is but the first stage in a sacred history leading the saved to become 'more just' (*iustiores*).⁹⁶ Adherence to the literal law (not just its spiritual significance) cannot therefore only be a sign of ignominy, as it is for the Jews. After all, as Ambrosiaster discusses in some detail, even Christ submitted to the Law when he consented to be circumcised and offered sacrifices in the Jewish Temple, proving he was not an 'enemy of the Law' (*inimicus legis*).⁹⁷ Ambrosiaster thus finds the legalistic boasting of the Jews particularly grating: 'Why therefore do they [the Jews] say, 'The Law is ours,' when it is clear that it is a gift of God for all believers? Therefore let this rash usurpation cease, for the grace of God is common to all!'.⁹⁸ Here 'the Law' becomes more than a discontinuous system of moral imperatives and defunct rituals; it is a link in the grace of salvation. To arrive at this point, Ambrosiaster must not only emphasize the 'natural' state of God's Law by aligning *lex divina* and *ius romana* (the two tablets of Moses and the Twelve Tables of the Republic), he must seize from the Jews their claim to the entire *lex data per Moysen*. The result is a complex fashioning of the Christian self that can triumphantly speak with the Jewish Law *adversus paganos*,⁹⁹ and yet claim solidarity with Rome in speaking *adversus Iudaeos*.

In these ambivalent and overlapping registers of condemnation and reconciliation between the Law of Moses and the laws of Rome, we glimpse a Christian context in which the collection of biblical 'legal materials' can make sense, in which (in the words of the *Collatio*) 'divine and human [i. e., Roman] judgment' can condemn 'with the same voice' (*consona voce*).¹⁰⁰ Scholars assume that the prime motive for such a juxtaposition of biblical and Roman values is cultural apologetic ('See, we aren't so different!'). But the deliberate juxtaposition of seemingly dissonant cultural elements might serve a more complex purpose than simple *apologia*: a religious identity that shows its superiority by both internalizing and transcending 'the other.' The twofold gesture of rejection and accommodation – of both Jewish Law and Roman *ius* – can be read, therefore, not as the confused jumble of a failed apologetic, but rather as the deliberate compilation of an authoritative, even imperial, religious self.

⁹² Ambrosiaster, *LQ* 8.1 (*CSEL* 50:32).

⁹³ Ambrosiaster, *LQ* 8.2 (*CSEL* 50:33).

⁹⁴ Ambrosiaster, *LQ* 72 (*CSEL* 50:124).

⁹⁵ Ambrosiaster, *LQ* (appendix novi testamenti) 19 (*CSEL* 50:435–36).

⁹⁶ Ambrosiaster, *LQ* 69.2 (*CSEL* 50:119).

⁹⁷ Ambrosiaster, *LQ* 50, 60 (*CSEL* 50: 96–97, 108).

⁹⁸ Ambrosiaster, *LQ* 44.13 (*CSEL* 50:79).

⁹⁹ Ambrosiaster, *LQ* 114 (*CSEL* 50:303–18).

¹⁰⁰ *Collatio* 6.7.1 (*FIRA* 2:561).

5 Conclusions: context, comparisons, and collation

My goal in this essay has been to ask whether we can reconstruct a plausible Christian context for the sympathetic reading of document text that begins, «Moses the priest of God says these things ...», followed by detailed pages of authoritative Roman jurisprudence.¹⁰¹ I would like to conclude by introducing another Christian witness to provide a context for my suggestion that the *Collatio* can be read as a cultural tour de force of imperial Christianity. This text, the Vergilian *Cento* of the Roman matron Proba, is a literary curiosity as little read and understood as the *Collatio*. It is usually ascribed to Faltonia Betitia Proba, Roman *clarissima*, sadly «the only female writer of early orthodox Christianity who has an entire work still extant».¹⁰² This equally «*misterioso documento*» synthesizes Christian faith and «secular» Roman culture by retelling the biblical narrative (with some events given more attention than others, of course) in reconstructed half-verses from the works of Vergil. A painstaking process, this Christianization of Vergil seeks «to express [the] new religion in the phrases of the loftiest products of ancient culture».¹⁰³ The entire bible is the meat of Christian poetry for Proba, including the shadowy figure of Moses, whom she places early in her poem at the dawn of the history of classical and Christian literature as the legendary Musaeus.¹⁰⁴ Moses, author of «the Law», acts as one medium through which classical epic is transformed into salvation history, naturalizing the Christian story recited in high Vergilian verse.

Like the *Collatio*, Proba's *Cento* for all its lofty versification is in some ways a resistant text: we possess none of Proba's original words to tell us what it is she thought she was doing, only reconfigured bits of her literary culture. As is the case with the *Collatio*, we have essentially only the *fact* of the creative work, how the bits are reconfigured, from which to draw conclusions about the cultural forces that inspired its production. In a broader scheme of Christian cultural configuration in late ancient Rome, the *uses* to which either text might be put are strikingly similar. As one scholar of Roman law has noted, late antiquity «was an age of anthologists and epitomisers».¹⁰⁵ The past could be construed as a series of texts, phrases laden with cultural significance whose reorganization and recapitulation could serve to define with greater depth the shape and texture of present identity. To pick up and rework these texts in a new framework – whether it be in the hands of late Roman *grammatici* or early Christian *rhetoires* – was to claim a particular kind of affinity with and authority over the powerful roots of cultural identity.¹⁰⁶

Yet the work of the anthologist is always clearly marked and visible; it leaves seams and traces of ambivalence in the project of cultural appropriation.¹⁰⁷ Proba's Vergilian

101 *Collatio* 1.1 (*FIRA* 2:544).

102 Clark and Hatch 1981: 98. On Proba's aristocratic lineage, see Jones *et al.* 1971: 732; and Sivan 1993. For arguments that the *Cento* should be ascribed to this Proba's granddaughter (Anicia Juliana Proba), a contemporary of Jerome and refugee from the sack of Rome, see Shanzer 1986 and Shanzer 1994.

103 Clark and Hatch 1981: 105.

104 Proba, *Cento* 11. 35–37 (Clark and Hatch 1981: 18): «*nam memini veterum voluens monumenta virorum/Musaeum ante omnes vestrum cecinisse per orbem/quae sint, quae fuerint, quae mox ventura trahantur*». On the conflation of «Musaeus» the legendary prehistoric Greek poet and Moses, see Gager 1971: 139.

105 Honoré 1978: xvii. See also Ando 2001.

106 See Chin 2004.

107 An apt comparison from the second sophistic might be the parallel *Lives* of Plutarch which, on the one hand, create meaningful connections between the cultural heroes of Greece and Rome and yet also cannot help but highlight the gaps between them.

versification of Christian sacred history will always evoke difference and distance even as it attempts to construe sameness: a reader may delight in (or disapprove of) Christ-as-Aeneas,¹⁰⁸ but the same delight of recognition («That's from book six!») will always reinforce the strangeness of the comparison («But now it's different»). Like Proba's *Cento*, the *Collatio* engages in a cultural performance of recapitulation that very obviously and schematically absorbs «the Other» into the defining matrix of the self. Aligning Mosaic law with the great jurists of classical Rome and recasting «*divina loquentia*» in Vergilian *centos* can be viewed as equally ambivalent methods of bridging – and yet, reinforcing – that the dizzying space between «self» and «other», between sacred and secular. Both also introduce that third note – the Scriptures, the patrimony of Moses, the Lawgiver of the Jews – into that dizzying space between *Christianitas* and *Romanitas* to create a complex, even imperial, monument of Christian selfhood constructed out of the *spolia* of Jews and pagans.

108 Jerome, in a particularly mean-spirited dig, mocked the «childish» and potentially blasphemous composition of Christian Vergilian *centos*, presumably that of Proba: *Ep.* 52.7.2–3 (*CSEL* 54:453–54), on which see Clark and Hatch 1981: 104–5.

Chapter 6

Prohibitions of Religion in Antiquity:
Setting the Course of Europe's Religious History

by

Dorothea Baudy, Konstanz
translated by Jutta RaithelDedicated to Burkhard Gladigow, *magistro optimo*,
on the occasion of his 65th birthday1 Dangerous religion? Modern democracies between religious liberty
and regulation

As long as it fulfills a role aligned with the interest of the state or is considered a part of society with minor significance, religion receives little attention in the media: there are too many ritualistic repetitions or moralizing speeches, too few scandals – nothing worth reporting. The situation changes abruptly whenever conflicts flare up, providing material for sensational news stories and provoking heated debates. As soon as people get hurt the same questions always surface: could the drama have been prevented? Should not the state – whose task it is to protect its citizens – have recognized the danger in time and suppressed the religious community in question? Several incidents in recent decades demonstrate that this dilemma confronts all modern societies in which the constitution guarantees the right of religious freedom:¹ on the one hand, it is necessary to defend this fundamental right and, on the other hand, every state has the responsibility, even the duty, to combat any abuse of the freedoms granted by it. As soon as the discussion takes a concrete form, this is exactly the point where juridical and political questions are bound to intersect.² Which non-conventional religious practices of minorities does the majority of society have to tolerate for the sake of its own liberal values? What religious communities could pose threats that would justify their suppression?

1 The relevant entry in the German constitution is art. 4 (for introduction and additional bibliography see Leder 1996: 151–170; the corresponding entry in the European Convention for the Protection of Human Rights, art. 9 I, reads: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance' (Council of Europe, 'Convention for the Protection of Human Rights and Fundamental Freedoms' – as amended by Protocol No. 11), *European Treaty series*, no. 5). On this see Bleckmann 1996: 17.

2 Cf. Eberl 2001.

Only a few years ago, the public took great interest in conflicts involving so-called 'sects'. The attractiveness of 'youth religions' seemed confusing; several disasters with many casualties were alarming: in 1978, 900 members of the People's Temple movement died in Guyana; in 1993, 84 'Branch Davidians' died in Waco, Texas, in a confrontation with federal police; the Tokyo subway terrorist attack by Aum Shinrikyo killed 18 and injured 5000. These are only the most spectacular cases. The debate within Germany, for example, regarding the so-called church of Scientology, which was accused of wanting to create a 'state within the state,' was fierce. Against this background, members of the media demanded that a timely stop be put to such suspect groups to prevent actions such as the poison gas attack in Japan from occurring. In the last years of the 20th century, the parliaments of several European states, including the German Bundestag, appointed commissions of inquiry to work out recommendations for how to deal with new religious movements.³ For conflicts that develop from time to time with familiar and more-or-less-integrated religious minorities, there are well-tested procedures in place. This holds true for so-called sects, provided that they have been established over a long period of time, as well as for members of the 'high religions', for example, Muslims. In many individual cases, existing laws are capable of dealing with the refusal of blood transfusion and of military service, the slaughter of animals according to religious rites, the building of mosques. The irritation caused by new and unknown groups, however, is sometimes so great that the public as well as parliaments are moved to discuss the need to alter or amend the law. These discussions flare up again and again after each spectacular incident; but each time the need to alter the laws turns out to be slight at best. Nevertheless, during debates about sects, jurists continue to propose the emendation of constitutions to allow the suppression of religions.⁴

The debate about religion's potential for causing conflict⁵ has increased in acrimony⁶ due to the Balkan War⁷ and the terrorist attack of September 11, 2001.⁸ Now it is no longer the apocalyptic element that is feared – on the occasion of the millennium, they might have set the world on fire – but the 'Islamists', who call for a 'Holy War'. Already in Germany, for example, the endeavor to restrict the scope of action available to Muslim extremists has led to a change in the law regulating clubs, organizations, and societies (*Vereinsrecht*).

But it would be a mistake to regard changes in the law since 2001 as motivated by a single occurrence. In fact, what was presented to the public as a quick and effective anti-terrorist measure had in fact been in preparation for quite a while. As the select committee for *«Sogenannte Sekten und Psychogruppen»*, which published its final report in

3 After the interim report of July 7th, 1997, the final report of the select committee *«Sogenannte Sekten und Psychogruppen»*, appointed through the resolution of May 9th, 1996 by the German Bundestag, is now available (*Drucksache* 13/10950, 9. Juni 1998). On the select committees of other European nations see the instructive introduction (*«Das «Sektenproblem»: Öffentliche Meinung, Wissenschaftler und der Staat»*) by Hubert Seiwert to his edition of the studies of Massimo Introvigne (Introvigne 1998: 9–38). On essentials see also Zinser 2000: 219–231.

4 Cf. Müller-Volbehr 1985: 111–140, 136: *«Im großen und ganzen reicht das vorhandene Rechtsinstrumentarium aus, um eventuellen Mißbräuchen zu begegnen ... De constitutione ferenda wäre es allerdings zu begrüßen, würde der Verfassungsgeber Art. 4 GG mit der Möglichkeit eines Verbotes von Religions- und Weltanschauungsgemeinschaften anreichern.»* For an analysis of the legal situation that developed against the background of the Scientology-debate, see Veelken 1999.

5 Cf. the essays in Nayak 2000.

6 Several interesting contributions on the public debate may be found in Schicha and Brosda 2002.

7 On this see Kippenberg 1999.

8 On this see Kippenberg 2004.

June 1998, convincingly explained, the existing criminal laws sufficed for taking legal action against any abuses or practices of individual groups that are not acceptable to society as a whole, so that no special religious laws are needed. There was one problem, however, insofar as the German law of clubs, organizations and societies (*Vereinsgesetz*), which was added to the constitution in 1964, included special regulations for *Religionsgemeinschaften und Vereinigungen, die sich die gemeinschaftliche Pflege einer Weltanschauung zur Aufgabe machen*.⁹ Whereas all other organizations, and even parties, could be prohibited if they violated the constitution or existing laws, this was not possible in the case of religious communities, because they are specially protected under the law. Soon after September 11th 2001, this so called 'religious privilege'⁹ was removed from the constitution to make it possible to take counter-measures against extremist Muslim organizations. The new bill was immediately put into practice with the prohibition of the 'Caliphate State' (*Kalifatsstaat*), a radical organization in Cologne headed by Metin Kaplan.

The political debate about religious minorities directly affects academics in the field of religious studies. Whether invited as experts to committees (or not, as the case may be),¹⁰ they are involved in social processes of decision-making and in power struggles. This can cause them to intervene actively and to declare their political positions.¹¹ Research is therefore required, first to remedy the lack of information about hitherto insufficiently-known religious groups¹² and, second, to contribute through education to the realistic assessment of future conflicts. In my opinion, we can achieve a broader understanding of the state regulation of religion if we place it in a historical context. Has not the Christian West been shaped in a decisive manner by state prohibitions of religions in late antiquity? Do these not continue to have an effect on our modern cultural landscape? When religious behavior can become the subject of political discussions and decisions, should we not ask to what extent religious policy determines the course of religious history? This is true for the present, and it is all the more true of that epoch in which the course of European religious history was set.

In the following pages I highlight some famous conflicts in the history of religion in the ancient world, in order to draw out those systemic features that bear comparison with problems confronting modern democracies. My interest therefore lies with typical conflicts

9 The motion for the law says: *«Nach § 2 Abs. 2 Nr. 3 VereinsG (sog. Religionsprivileg) findet das Vereinsgesetz auf Religionsgemeinschaften und Vereinigungen, die sich die gemeinschaftliche Pflege einer Weltanschauung zur Aufgabe machen, im Rahmen des Artikel 140 des Grundgesetzes (GG) i. V. m. Artikel 137 der Deutschen Verfassung vom 11. August 1919 (Weimarer Reichsverfassung, WRV), keine Anwendung. Das 1964 als Ausführungsgesetz zu Artikel 9 GG erlassene Vereinsgesetz klammert auf diese Weise Religionsgemeinschaften und Weltanschauungsvereinigungen aus seinem Anwendungsbereich aus. Das Vereinsgesetz lässt daher bisher keine Verbotsmöglichkeiten gegen extremistische Religionsgemeinschaften zu, während gegen sonstige Vereine nach § 3 VereinsG mit Verbotsverfügungen vorgegangen werden kann. Bei Parteien kann das Bundesverfassungsgericht die Verfassungswidrigkeit feststellen. Die seit Schaffung des Vereinsgesetzes gesammelten Erfahrungen zeigen jedoch, dass ein Bedürfnis besteht, gegen Vereinigungen, deren Zwecke oder Tätigkeit den Strafgesetzen zuwiderlaufen, sich gegen die verfassungsmäßige Ordnung oder den Gedanken der Völkerverständigung richten, auch dann ein Verbot aussprechen zu können, wenn es sich um Religionsgemeinschaften handelt.»*

10 Cf. Baumann 1995. The 'experts on Islam' who, after September 11th, appeared in public were journalists and theologians rather than representatives of religious studies.

11 On this see the explanations by Seiwert and Introvigne in Introvigne 1998.

12 The *«Religionswissenschaftliche Medien- und Informationsdienst e. V. REMID»* has dedicated itself to a combination of information and involvement. Relevant, for the topic at hand, are two anthologies: Klinkhammer, Rink and Frick 1997 and Klinkhammer and Frick 2002.

or, better yet, with those aspects of religious conflicts that can arise between state and religion at any time and at any place. Traditional customs can be challenged by new religious movements or the immigration of minorities; ritual actions can offend the common law; cult members can pursue goals that threaten public order. Among the possible reactions on the part of the state are prohibitions of religious practices or groups. Which measures are taken in any given case depends on the evaluation performed by parties in power. Their assessment, in turn, is shaped by patterns in history, whether directly, when measures taken in earlier times survive as historical exempla and legal precedent, or indirectly, when those measures persist through their consequences or as legitimizing models or cultural myths. My attention therefore proceeds chronologically, because each action that I study served as the backdrop for those that succeeded it. At the same time, I do not suggest that the history I unfold should be read or reconstructed developmentally. Some types of conflict, as also efforts at their resolution, may be found from ancient times until today. The definitive history of religious prohibitions can scarcely be written, because it is a necessary by-product of all religious change. In the following analysis, I further confine myself to one aspect of this history, namely, its codification in the law, for it is the law that has provided the instruments for regulating religions, even when those instruments have not immediately produced severe consequences such as persecution. I therefore set aside altogether quarrels between different religious groups and their cultural consequences.

2 Bad religion? *Asebeia*, *superstitio*, and magic

It is not only in modern societies that religion is not discussed as long as it functions well. I assume that every community has unspoken boundaries, separating socially accepted religious behavior from that which is not, as is the case regarding food practices, for example. These boundaries of unquestioned customs become, in periods of conflict, visible sources of contention.

Plato's dialogue *Euthyphro* provides us with the first Western example of a detailed discussion of this problem. The trial for *asebeia*, impiety, against Socrates (as against other philosophers before him),¹³ raises the question what constitutes 'correct' religious behavior. What is pious, what is impious or atheistic? Where does exaggeration or superstition start? For Socrates, the defendant, these philosophical questions, discussed in exacting detail in the course of the dialogue, were questions of life and death. 'The charge brought against him read', according to Xenophon's *Memorabilia*, 'approximately like this: Socrates acts unjustly by not acknowledging the gods acknowledged by the polis and by introducing other divine beings instead; he also acts unjustly by corrupting the young.'¹⁴ The penalty requested was death.

Is it, therefore, a civic duty to practice a particular religion? What criteria are available to the judge to distinguish between appropriate and inappropriate religious behavior? How does religion become the subject of legislation and jurisdiction? First of all, let us start from the assumption that in any culture religious behavior, like other areas of social life, is arranged by tacit consensus. One does certain things, and if one does not do them, or does not do them in the customary manner, one causes offence. What is appropriate, what is customary in dealing with the gods, is at first always something that goes without saying,

13 On details see Görgemanns 1995.

14 Xen. *Memorabilia* 1.1.1. Cf. Plato *Ap.* 24bc and *Euthyphr.* 2c and 3b.

something that is not verbalized and that is only identified as a central issue when conflicts arise. Only then does it become necessary to decide on a positive norm, to define and work out what, until then, had been taken for granted. «Right» and «wrong» religious behaviors always are inextricably interwoven. Half a millennium after the trial of Socrates, Plutarch in a philosophical treatise defined *eusebeia* – i. e., the socially accepted form of piety – as the mean between atheism and *deisidaimonia*, an analog for Latin *superstitio*, which might be literally rendered «excessive or irrational fear of the gods».¹⁵ In social practice, however, (and I would like to add: to this very day) both «atheism» and «superstition» are not used for analytical or descriptive purposes, but serve to stigmatize undesirable behavior.¹⁶ They are used in strategies of social exclusion. In what kinds of conflicts does what counts as «normal» religious behavior become an issue? How do societies deal with persons who deviate from this «norm»? The outcome of the trial of Socrates is known: the philosopher was executed in the year 399 BCE.

In Roman culture, the earliest extant evidence for state regulation of religious behavior is a passage in the so-called Twelve Tables, presumably from the fifth century BCE. In this oldest Roman legal document, a specific category of damaging spells (*Schadenszauber*), namely, making grain disappear from the field by magic, was prohibited.¹⁷ In this case it is not so much the action's religious quality, however, as its criminal aspect that attracted attention. It was not the magical act as such that was problematic but the material damage that it could cause, an emphasis evidently in accord with social belief at that time.¹⁸ That is why this kind of magic was labeled a criminal ritual action. Practice in modern secular states is in some respects similar: the effectiveness of satanic cult or exorcism is irrelevant. Independent from the ritual's symbolic qualities, what is relevant according to the law is solely a demonstrable violation of the rights of ownership or of the person that can occur in the course of the ritual.

The oldest trial for magic that we know of in antiquity took place at the beginning of the second century BCE on the basis of this law. Fortunately, the defendant – a freedman by the name of C. Furius Cresimus – was able to convince the court that the remarkably good yield of his fields, which had prompted the accusation of practicing magic from his envious, richer neighbors, resulted from his particularly hard work.¹⁹

The *lex Cornelia* «concerning murderers and poisoners»,²⁰ introduced by Sulla in the year 81 BCE, was also the basis for several trials for magic, since, for example, administering a love-potion could fall under it. Just like the law from the Twelve Tables, the *lex Cornelia* aims at the actual damages resulting from magical actions. In the case heard against Apuleius around the year 160 CE in Sabratha, a city in the province of Africa, the relatives of his wife had initiated proceedings, since they saw themselves done out of their inheritance by the widow's remarriage to the «bewitching» philosopher.²¹

Around the year 320 CE, Constantine took up the topic and decreed that magic was illegal and severely to be punished, with the exception of healing magic and various rites

15 Plut. *De Superstitione* 14 (*Mor.* 171E)

16 Cf. Gladigow 1988.

17 Cf. especially *tabulae duodecim* VIII 8.a. On this topic see Tupet 1986: 2591–2675, 2592 ff.; Graf 1996: 41 ff.; and Rives 2002.

18 Garosi 1976: 13–93, 33; Graf 1996: 42; and Rives 2003. I treat magic here as a special case of religion (on the terminology, see Versnel 1991).

19 Plin., *NH.* 18.41–43. For the details see Graf 1996: 58 ff.

20 *Lex Cornelia de sicariis et veneficis*; cf. Graf 1996: 45 ff.; Rives 2003.

21 Apuleius defended himself and published his speech (*Apologia sive de magia*) later. On this see Graf 1996: 61 ff., and the essay by J. B. Rives in this volume.

for safeguarding the yield of fields.²² This did not keep his son Constantius, a good 35 years later, from cursing magicians himself.²³ In fact, right into the early modern era, accusations of practicing harmful magic play a not insignificant role in witch trials.

3 Religion under suspicion: the fear of conspiracies

Ancient measures against illegal religious (and often excluded as «magical») practices aimed at preventing actual – and for the most part material – damages. But as the example of Socrates' trial for impiety already shows, religious behavior that deviates from the norm can easily acquire a political dimension, as soon as evangelization and group formation become an issue. An important charge against the philosopher was the accusation that he infected the youth with his ideas. From its own point of view, the Athenian *polis* was trying, by recourse to rigid measures, to suppress an opposition movement at its inception.

To some extent, this way of proceeding is comparable to the so-called Bacchanalian scandal. It can be viewed as a spectacular clash between traditional Roman culture and a new religious movement. The Roman senate passed a decree that prohibited the cult of Bacchus – with only a few, very limited exceptions – in the territory under its jurisdiction. In the *Senatus consultum de Bacchananlibus*, preserved in a Calabrian inscription from the year 186 BCE,²⁴ the following regulations are laid down not only for Roman citizens, but also for members of the Latin League and for Rome's allies: no one who still belonged to the cult is allowed to have a sanctuary to Bacchus; no man is allowed to mingle with the Bacchantes; no man is allowed to be priest; it is forbidden to appoint a female or a male presider or official or to accept such an appointment; it is also forbidden to have communal funds; any kind of oath, vow, contract, or promise among the members is prohibited; no one is to hold ceremonies in secret, be they on public or on private grounds or outside the city; no more than five persons – of which no more than two can be men – are permitted to participate in cult celebrations. In regard to some of the practices mentioned above, exceptions were permitted for religious reasons. But one had to apply to the praetor of the city for these exceptions and they had to be approved by senatorial decree in the presence of at least 100 senators. Violations were open to criminal prosecution. The entire set of prohibitions aimed at crushing the existing religious movement, but especially at preventing gatherings and the possibility of renewing the organization.

The rigidity of the measures alone shows the fear of conspiracies that is so vividly described by Livy almost two hundred years later: he saw in the Bacchanals a secret conspiracy whose members met each other for nocturnal cult activities at which they abandoned themselves to all kinds of excesses and made plans for fraud and murder.²⁵ Members who did not comply were slaughtered like sacrificial animals, as cymbals and tambourines were beaten to drown their shouts. The movement spread like an infectious disease and tried to seduce young persons especially. Because of the increasing number of its members it gradually turned into a state within the state, its members constituting an *alter populus*, another people, whose nocturnal meetings would be equal and opposed to

22 *Cod. Theod.* 9.16.3.

23 *Cod. Theod.* 9.16.5.

24 *CIL* I², 581 = *FIRA* 1, no. 30. Cf. the account in Livy 39.8–19 ff. Relevant: Pailler 1988. Cf. Cancik-Lindemaier 1996, as well as Frateantonio 1997.

25 Livy 39.8–19. Charging undesirable groups with conspiracy is a common-place. On this see Groh 1987 = idem 1992: 267–304. On the topic in the context of a far-reaching list of accusations see Baudy 1999.

those of the *populus Romanus*.²⁶ Livy further relates that the consul Postumius conducted an investigation on the basis of a report. In a specially-convened public assembly, he reminded his audience that «only those gods exist whom your ancestors ordered you to attend, to worship, and to call upon in prayer and not those who beguile the mind with incorrect and foreign ceremonies and goad people, like the Furies, to every crime and excess». Subsequently, he pointed out that, already in the days of their forefathers, officials had the responsibility to «prohibit the practice of foreign cults; ban «self-appointed» [as one would say today] priests and soothsayers from the forum, the circus, and the city; search for and burn books of divination; and do away with any sacrificial rite that did not correspond to Roman custom». Accordingly, the sites of the Bacchic mysteries ought to be destroyed and the loathsome meetings be dispersed. Informers should receive generous rewards.

Here, Livy brings out in a propagandistic manner the fear that a notionally foreign cult, bringing with it foreign customs, could provide cover for groups hostile to the state. This fear rested on an implicit sociological theory, namely, the understanding in ancient societies that the stability of the state was closely linked to the integrative function of the religions practiced within it. Conversely, opposition groups, which had no political form of organization, also depended on the same force of social cohesion.²⁷ For his part, Livy approves the state religion to the exclusion of other possibilities. In 29 BCE, according to Cassius Dio, Maecenas delivered a speech before Augustus that formulated precisely such a program of religious politics: «You yourself worship the divine everywhere and in every respect according to ancestral custom and force others to do the same. But be angry with those who bring what is foreign to the cult of the gods and punish them, not only on account of the gods, whose despisers surely will not revere anyone else, but also because these persons who, having a mind of their own, introduce new deities and lead many to live according to foreign customs. From this come conspiracies, factions, and secret societies, all of them most harmful to the monarchy ...»²⁸ The testimony of both historians – Livy's about the prohibition of the Bacchanals and Cassius Dio's about religious policies under Augustus – are particularly interesting with respect to a fundamental change in the Roman legislation on clubs, organizations, and societies. It was triggered in the first instance by a political argument over the *Compitalia*, a winter feast in which the entire Roman people took part, both inside and outside of the city. When, in 64 BCE, a prohibition was enacted against the *collegia* of the *Compita*, the cross-roads, which in Rome played a role historically associated with the *familia*, as also against the games organized by them,²⁹ the suspicion of a conspiracy played a decisive role, as it had in the case of the Bacchanalia. As with the vigorous action taken against the latter, this prohibition was caused by a political crisis.³⁰ But over and above this, the ban was aimed at clubs, organizations, and societies more broadly defined, and not only at the *collegia compitalicia*.³¹ Even where just these *collegia* were concerned, the prohibition had considerable scope. Here, a traditional,

26 Livy 39.13.14; 39.16.4.

27 Relevant to this topic: Baudy G. 2002; Gordon 1990; and Woolf 2003.

28 The «source» for this (almost certainly pseudo-historical) speech is Cassius Dio 52.36.1 ff. On this see also Momigliano 1987: 146 ff.

29 Again, by a decree of the senate; see Asconius *Pis.* 7 (and cf. *Corn.* 75): *L. Iulio C. Marcio consulibus, quos et ipse Cicero supra memoravit, senatus consulto collegia sublata sunt, quae adversus rem publicam videbantur esse constituta. Solebant autem magistri collegiorum ludos facere, sicut magistri vicorum faciebant, Compitalicios praetextati, qui ludi sublatis collegiis discussi sunt.*

30 On this see Accame 1942: 17 ff., 24, and Flambard 1977.

31 Cf. Flambard 1977: 117 ff. Important earlier literature includes Mommsen 1843; Liebenam 1890; and, as regards the law, de Robertis 1938: 53 ff., 131 ff.; and Sini 2001.

widespread practice was affected.³² Whereas the organization of the rural *Compitalia* was in the hands of the *familia*, the civic festivals were organized by clubs. In both cases slaves and freedmen played a substantial role.³³ The reason for the restriction, explicitly mentioned by the decree of the senate, was the alleged hostility of the *collegia* to the state.³⁴ The prohibition was thus not religiously motivated; its aims were political. It has nevertheless generated severe consequences in the history of religion.

This prohibition of the *Compitalia* is interesting not so much because it affected a religious organization and its practices, but because prohibitions of this kind, namely, those aimed at the social and institutional infrastructure of select societies, became the tool of choice for state authorities who wished to act against unpopular religious organizations. Like other groups – and, incidentally, like most religious minorities today – the *collegia compitalicia* were covered by the law of clubs, organizations, and societies;³⁵ at the same time, they, and in a sense, all ancient societies – including guilds of craftsmen or traders and fire brigades – had religious concerns at their core: every community in the ancient world constituted itself through collective worship of its gods.³⁶ In the wake of these debates, the law of associations developed under Caesar and Augustus in ways favorable to its deployment against the unwelcome collective exercise of religion. In particular, it was through this law that the central power claimed the authority to rule on the admissibility of the new communities.³⁷ This affected above all «foreign» groups,³⁸ such as the Egyptian and, later, Christian minorities. Jews, who had documented rights, enjoyed a certain (although only temporary) protection.³⁹ On the whole, one can see a tendency towards an increasing regulation of the formation of religious communities.

Several letters exchanged by Pliny the Younger and the emperor Trajan during the former's tenure in the province of Bithynia, circa 110 CE, may be read profitably in light of this argument.⁴⁰ One such letter, together with Trajan's response, concerns a petition by the

32 The etiological myth traced it back to Servius Tullius (Dionysius of Halicarnassus 4.14.3–4 and Plin. *NH.* 36.204). After they were forbidden by Tarquinius Superbus (Dionysius of Halicarnassus 4.43.2) or observed with human sacrifices (Macrobius *Sat.* 1.7.34 f.), they are said to have been instituted, in the customary form, by the first consuls. On the debate about the actual age of the *Compitalia* clubs see Bömer 1957: 35 ff.

33 Cf. Bömer 1957: 32 ff., and Treggiari 1969: 168 ff.

34 See Asconius *Pis.* 7 (quoted in n. 29).

35 Legal aspects of clubs, organizations, and societies (*Vereinswesen*) are treated by Kaser 1971: 307 ff. Fundamental on the legal organization of ancient religions in the form of societies (*Vereinsstruktur*): Kehrer 1982: 91 ff. Unfortunately, I did not have access to *Der Öffentlichkeitsstatus von Religionsgemeinschaften*, ed. Hans G. Kippenberg (Tübingen, 2004).

36 The way in which a society was organized followed in detail the constitution of the municipality; as the latter, the former was protected by a deity and its members practiced a communal cult: shown by Liebenam 1890: 178 f., with reference to Gaius, *Dig.* 3.4.1.1.

37 *FIRA* III n. 38 indicates that a *lex Julia* – «*offenbar unter Augustus*» – prescribed the «*Zulassung durch den Senat für alle Vereine, deren Satzungen Mitgliederversammlungen vorsehen*»: see Kaser 1971: 308, with a literature review in n. 52. Later, the law was amended through *senatus consulta* und imperial edicts: *Dig.* 3.4.1. *pr.* (Gaius); *Dig.* 47.22.1.3 (Marcion); *FIRA* III 35; cf. De Robertis 1938: 167 ff.

38 Explicit in the «Maecenas Speech» in Cassius Dio 53.36.1 ff. On this, see also, among others, Momigliano 1987: 142–158, esp. 146 ff.

39 Cf. Josephus *Antiquities* 14.10.8; 16.6.2. Egyptian cults at Rome were affected by prohibitions since 58 BCE. Under Augustus they were tolerated only outside the city: Cassius Dio 53.2.4, 54.6.6. Already under Tiberius the climate was rougher: see Suetonius *Tib.* 36: «he suppressed foreign cults and forced the followers of this belief to burn their liturgical vestments along with all implements of their cult.» See also Tacitus *Ann.* 2.85; Josephus *Antiquities* 19.286–290; Suetonius *Claud.* 25; Cassius Dio 60.6.6; Orosius 7.6; Eusebius *Hist. eccl.* 2.18.

40 Vidman 1960 is fundamental.

city of Nicomedia for authorization to form a firefighters' association.⁴¹ The petition was turned down, with the explanation that the population – a notoriously rebellious one – would undoubtedly abuse this right in order to found a politically questionable association.⁴² The emperor's interest in retaining the power to permit or preclude the formation of new *collegia* is remarkable.⁴³ This interest arises from a constant worry that each and every association might become the basis for a conspiracy. The essentially political basis for this concern found expression in the charge leveled against those who joined illegal organizations: they were treated as though rebels against the state and were charged with *crimen laesae maiestatis*, with treason.⁴⁴

Of course, this imperial interest in controlling organizations of any kind faced various obstacles, including problems arising from Roman public law. For example, Trajan could hardly turn down the petition of the free and federate city of Amisos to administer a fund for the poor on the basis of its own laws. But in his reply to Pliny, Trajan included not only a warning about possible abuses but also an unambiguous order to prevent such organizations wherever possible.⁴⁵

The most interesting letters of this kind are those in which Pliny and Trajan discuss how to deal with Christians, for they approach the issue from different sides, and their conversation reveals wide-ranging assumptions regarding the benefits of a restrictive policy on societies and organizations.⁴⁶ In Pliny's letter it is taken for granted that the Christian communities were not authorized organizations and were, therefore, prohibited.⁴⁷ Pliny then asks how he is to proceed with those who are denounced as Christians. Does mere membership, whether current or lapsed, count as a crime? Or only otherwise criminalized actions, taken in consequence of membership? To test whether those who in the course of the investigation distanced themselves from the illegal organization were credible, Pliny asked them to invoke the Roman gods with a given formula and offer wine and incense before the image of the emperor. He also demanded that they curse Christ – since it was said that true Christians could not be forced to do so.⁴⁸ What Pliny considered to be problematic was not Christian belief – he regards it as folly,⁴⁹ a wild, excessive, albeit contagious superstition⁵⁰ – but its effects on public life. As the Christians increased in number, the temples were progressively abandoned, sacrifices were neglected, and the meat of sacrificial victims went unsold.⁵¹ But hovering in the background of the entire event is

41 Plin. Ep. 10.33.

42 Plin. Ep. 10.34 (a *hetairia*).

43 Cf. Plin. Pan. 54; cf. Liebenam 1890: 228.

44 Dig. 47.22.2 (Ulpian).

45 Plin. Ep. 10.93: *Amisenos, quorum libellum epistulae tuae iunxeras, si legibus istorum, quibus beneficio foederis utuntur, concessum est erant habere, possumus, quominus habenat, non impedire, eo facilius, si tali collatione non ad turbas et illicitos coetus, sed ad sustinendam tenuiorum inopiam utuntur. in ceteris civitatibus, quae nostro iure obstrictae sunt, res huius modi prohibenda est.* Regarding support, and funeral associations in general see Liebenam 1890: 40 ff.

46 Plin. Ep. 10.96; on the legal aspects of this correspondence see Mayer-Maly 1956; de Ste. Croix 1974.

47 Plin. Ep. 10.96.8: *... quod ipsum facere desisse post edictum meum, quo secundum mandata tua hetaerias esse vetueram.*

48 Plin. Ep. 10.96.5: *Qui negabant esse se Christianos aut fuisse, cum praeunte me deos appellarent et imagini tuae, quam propter hoc iusseram cum simulacris numinum adferri, ture ac vino supplicarent, praeterea maledicerent Christo, quorum nihil cogi posse dicuntur, qui sunt re vera Christiani, dimittendos esse putavi.* Cf. 10.96.6.

49 Plin. Ep. 10.96.4: *amentia*.

50 Plin. Ep. 10.96.8: *nihil aliud inveni quam superstitionem pravam, immodicam.* Cf. 10.96.9: *superstitionis istius contagio.*

51 Plin. Ep. 10.96.10: *certe satis constat prope iam desolata templa coepisse celebrari et sacra*

again the suspicion of conspiracy, a suspicion that could not be dispelled, even though Pliny could not confirm, despite the use of torture, that the Christians had actually committed the atrocities of which they were accused.⁵²

This letter is exemplary in two ways: it reveals what questions arose from the actual application of the existing law of clubs, organizations, and societies. Moreover, it is a concrete example of the numerous charges brought against Christians, which accused them of forming unauthorized organizations and attending illegal gatherings. This was high treason, which is why the *collegia illicita* of this *religio nova* could be condemned according to the *lex maiestatis* and be persecuted accordingly.⁵³

4 Religious policy as means of totalitarian rule

Imperial religious policy in late antiquity shows in every respect a tendency towards increased regulation of religious behavior. Occasional individual measures – such as had always been taken when conflicts arose – more and more gave way to general prohibitions and wide-ranging persecutions.⁵⁴ A characteristic example of this is Diocletian's decree of 294 CE forbidding astrology.⁵⁵ This is the first time that an emperor banned a method of divination as a whole rather than an individual action.⁵⁶ The impetus behind this prohibition – as in the case of the individual measures of the Republican era – was the potentially explosive political nature of predictions.⁵⁷ Without a doubt, the greatest fear was that the spreading of bad tidings announcing the overthrow or death of a ruler might become impetus for a revolt.⁵⁸ According to Frederick Cramer, who has investigated precisely this issue in some detail, this correlation between legislation and political anxiety may not hold in the same way in the Christian empire. He argues that under Constantine and his successors, religious rather than political motivations become decisive in the implementation of repressive measures.⁵⁹ But it is precisely Constantine who provides a beautiful example illustrating that it was not religious activity *per se* that caused offence but its conspiratorial and sometimes subversive character. This is why Constantine permitted the traditional inspection of sacrificial victims to be performed in the public space of the temple, where it could be controlled, but prohibited it in private homes.⁶⁰ One of two almost identical laws reads:

We prohibit soothsayers (*haruspices*) and priests (*sacerdotes*) and those persons who are accustomed to minister to such ceremonies to approach a private home or to cross the threshold of another person under the pretext of friendship. We have provided punishment against them if they

sollemnia diu intermissa repeti passimques venire victimarum carnem, cuius adhuc rarissimus emptor inveniebatur.

52 The protestations of innocence are meant to counter the suspicion of conspiracy and to show the harmlessness of the Christian rites. Especially interesting is the emphasis on the innocent food, since this emphasis reflects the suspicion of Christian cannibalism. Cf. Baudy 1999.

53 Details in Liebenam 1890: 269 ff.

54 See Noethlichs 1971; Fögen 1993, 54 ff.; Cancik 1995: 199.

55 Cod. Iust. 9.18.2.

56 On this see Fögen 1993: 22 ff.

57 There is extensive material in Cramer 1951 and 1954. See also Stinskes 1989 and Barcélo 1992: 154.

58 Cf. Thomas 1971: 408: <In 1581 Parliament made it a statutory felony to erect figures, cast nativities, or calculate by prophecy how long the Queen would live or who would succeed her.>

59 See Cramer 1951: 10.

60 Cod. Theod. 9.16.1, 2. Lucrezi 1987 is very informative on this issue.

should disregard this statute. But you who think that this art is advantageous to you, go to the public altars and shrines and celebrate the rites of your custom; for we do not prohibit the ceremonies of a bygone perversion to be conducted openly.⁶¹

The second law shows that the penalty designated for the religious officials was death by burning.⁶² This law disparages the traditional practice of inspecting entrails as *superstitio*, superstition.⁶³ Informers can look forward to receiving a reward.⁶⁴

Some confusion is provoked by an apparent inconsistency in Constantine's legislation, for though he permitted the public inspection of victims, and even (in another law) required it when a palace or a public building was struck by lightning,⁶⁵ he is also said to have carried out a prohibition of Roman state cult in 319 or 320 CE,⁶⁶ and, more importantly, he had to know that a flash of lightning, traditionally regarded as an *omen*, would be interpreted to his disadvantage.⁶⁷ He attempted to forestall precisely this outcome by decreeing that the interpretation be «written up most diligently and made known to [him]». ⁶⁸ Since he could hardly forbid others to use a method of divination that he himself prescribed, he restricted himself to emphasizing once again that only what is done in public is lawful: the citizens are allowed to observe tradition «as long as they abstain from domestic sacrifices, which are especially prohibited».⁶⁹

It seems to me that precisely this phrase contains the clue that might solve the problem of the Constantinian prohibition of sacrifices, the existence of which is so incessantly discussed in the literature.⁷⁰ For the phrase implies that Constantine fully intended to abolish domestic sacrifice altogether, as he had prohibited the private inspection of victims the year before. Admittedly, it would be a gross misapprehension, if one were to equate the cult activities of the *familia* with «private religion» in the modern sense (however one understands the term).⁷¹ They were just as much a part of traditional Roman religion as public festivals. Of course, because secluded, they could provide an opportunity for conspiring against the state. But this did not make or, rather, had never made them into an illegal form of exercising religion: it was Constantine who made them such.

In 324 CE, after Constantine acquired the eastern part of the empire through his victory over Licinius, Eusebius tells us that he forbade, first, the participation of higher officials in

61 *Cod. Theod.* 9.16.2 (trans. Pharr): *Haruspices et sacerdotes et eos, qui huic ritui adsolent ministrare, ad privatam domum prohibemus accedere vel sub praetextu amicitiae limen alterius ingredi, poena contra eos proposita, si contempserint legem. Qui vero id vobis existimatis conducere, adite aras publicas adque delubra et consuetudinis vestrae celebrate sollemnia: nec enim prohibemus praeteritae usurpationis officia libera luce tractari.*

62 *Cod. Theod.* 9.16.1: *Nullus haruspex limen alterius accedat nec ob alteram causam, sed huiusmodi hominum quamvis vetus amicitia repellatur, concremando illo haruspice, qui ad domum alienam accesserit et illo, qui eum suasionibus vel praemiis evocaverit, post ademptionem bonorum in insulam detrudendo: superstitioni enim suae servire cupientes poterunt publice ritum proprium exercere. Accusatorem autem huius criminis non delatorem esse, sed dignum magis praemio arbitramur.*

63 On this see also Salzman 1987.

64 In view of this situation, it is not clear to me how Curran 1996 can assume that Constantine was tolerant at first.

65 *Cod. Theod.* 16.10.1 (17 December 320).

66 On this see also Gaudemet 1990.

67 Cf. Baudy D. 2002.

68 *Cod. Theod.* 16.10.1: *... ad nostram scientiam referatur ...*

69 *Cod. Theod.* 16.10.1: *dummodo sacrificiis domesticis abstineant, quae specialiter prohibita sunt.*

70 On this see Bradbury 1994, a very worthwhile essay.

71 On this see also Cicero *Leg.* 2.19: *«Separatim nemo habessit deos neve novos neve advenas nisi publice adscitos; privatim colunto quos rite a patribus cultos acceperint.» – «In urbibus delubra habento. Lucos in agris habento et Larum sedes.» – «Ritus familiae patrumque servanto.»*

sacrifices and, later, the sacrificial system as a whole.⁷² But Eusebius' claims are not corroborated by any extant law. In 341 CE, in the first prohibition of sacrifices that has come down to us,⁷³ Constantius does refer to a law promulgated by his father. It is possible, however, that he speaks not of a text that was later lost but of the prohibition of domestic cults I have already discussed. If that is so, then by his reference Constantius cites his father's example to lend authority to his own act, which would then constitute a tacit broadening of his father's measure. While the tone of the law of 341 is already sharp – sacrificial practice is denounced as *superstitio* and madness, and its observance is made a punishable offence – in a law of 356 CE Constantius went further, and imposed the death penalty on those offering sacrifice and venerating images of the gods.⁷⁴ This law crippled non-Christian religions of the time.⁷⁵

A general prohibition of the *curiositas divinandi* followed in 357. It was no longer permitted to consult a *haruspex*, astrologer, soothsayer, augur, or seer; a ban was placed on Chaldeans, magicians, and other *malefici*: «the curiosity of all these persons and the inquiries are to stop, once and for all.» Transgressors were threatened with death by the sword.⁷⁶ Constantius' criminalization of the different forms of religious practice and his denunciation of magicians as «enemies of the human race»⁷⁷ in the following year had far-reaching consequences. He decreed, at the same time, that the observance of any practice of this kind within the sphere of the imperial court was to be punished as lèse-majesté; even dignitaries were not to be exempted from torture, if they refused to confess.

With that, the legal basis was created for a particular type of trial, usually called a «trial for malefice» (*Malefiz-Prozess*). A direct path leads from there not only to the auto-da-fé of the Inquisition,⁷⁸ but also to the witch trials of the early modern period.⁷⁹ An accusation of performing harmful magic and of adhering to a *superstitio* was counted as high-treason (*crimen laesae Maiestatis*), which by itself led inevitably to conviction, since denying the accusation led invariably to intensified torture and, in the end, to death by burning – much the same was already true under Constantius in the mid-fourth century,⁸⁰ who here followed the precedent set down by his father with regard to *haruspices*.⁸¹ It was furthermore in just the era of the Inquisition that the «last heathens», those found in the New World, were notionally eradicated.⁸²

72 Eusebius *Vita Const.* 2.44 f. On this see also Bradbury 1994: 121 ff.

73 *Cod. Theod.* 16.10.2.

74 *Cod. Theod.* 16.10.6: *Poena capitis subiugari praecipimus eos, quos operam sacrificiis dare vel colere simulacra constiterit.*

75 *Cod. Theod.* 16.10.6. See Cancik 1995: 191 ff., as well as Cancik and Cancik-Lindemaier 1996: 275.

76 *Cod. Theod.* 9.16.4: *Nemo haruspice consulat aut mathematicum, nemo hariolum. Augurum et vatium prava confessio conticescat. Chaldaei ac magi et ceteri, quos maleficos ob facinorum magnitudinem vulgus appellat, nec ad hanc partem aliquid moliantur. Sileat omnibus perpetuo divinandi curiositas.* On this see Fögen 1993: 49 f.; Lucrezi 1987: 185.

77 *Cod. Theod.* 9.16.6: *... omnes magi, in quacumque sint parte terrarum, humani generis inimici credendi sunt, tamen quoniam qui in comitatu nostro sunt ipsam pulsant propemodum maiestatem, si quis magus vel magicis contaminibus adsuatus, qui maleficus vulgi consuetudine nuncupatur, aut haruspex aut hariolus aut certe augur vel etiam mathematicus aut narrandis somniis occultans artem aliquam divinandi aut certe aliquid horum simile exercens in comitatu meo vel Caesaris fuerit deprehensus, praesidio dignitatis cruciatus et tormenta non fugiat ...* On this, see Fögen 1993: 48 and 230 ff. By disparaging all magicians as humani generis inimici, Constantius picks up an anti-Jewish catchword: see Nestle 1927 and Baudy 1991: 27 ff.

78 On this, see Beck 1987: 10 ff.

79 Fundamental: Cohn 1975. Very helpful: Mohr 1993: 122–138.

80 See above, n. 76.

81 See above, n. 60.

It is characteristic of the way in which the state dealt with religious behavior in the fourth century CE that legislation focused increasingly not simply on the undesirable deeds of the state's subjects, but also on their convictions and especially on their *curiositas*, their thirst for knowledge. From this time on, the inner life of human beings was no longer an unlegislated area. An imperial «monopoly on knowledge» henceforth set limits to both religion and science.⁸³ The flip side of the prohibition of thought was the regulation of belief: in 380, the emperors Gratian, Valentinian, and Theodosius decreed that all their subjects should adhere to the faith «which the apostle Peter ... communicated to the Romans».⁸⁴ Twelve years later, the constituent practices of pagan religiosity were again prohibited in detail. The emperors Theodosius, Arcadius, and Honorius laid down that no person be permitted

to sacrifice an innocent animal to insensible images or to venerate, through solitary expiation, the *lar* with fire, the *genius* with wine, the *penates* with the smell of incense ... If anyone should dare to slaughter sacrificial animals or to interpret the still moving entrails, he will – in the manner of a person guilty of high treason, whom anyone can take to court – be subject to the appropriate penalty, even if he were not seeking to learn anything against or about the emperor's well-being. For it suffices for the magnitude of the crime that someone wants to abolish the laws of nature herself, to investigate what is unlawful, to examine what is hidden, to try to do what is forbidden, to inquire when another person's well-being will end, and to offer hope of another person's death.

Further detailed regulations followed, ending with the order that anyone who concealed such a transgression, or tolerated it due to carelessness, or delayed its punishment through hypocrisy, would pay thirty pounds of gold for the offense.⁸⁵

82 Already at the beginning of the fifth century Honorius and Theodosius had hoped in vain that they had won without any restrictions: *Cod. Theod.* 16.10.22: *Paganos qui supersunt, quamquam iam nullos esse credamus, promulgatarum ... iam dudum praescripta conpescant.*

83 Fögen 1993 brings out this aspect in an impressive way.

84 *Cod. Theod.* 16.1.2; in the *Codex Iustinianus* it takes the first place (1.1.1): *Cunctos populos, quos clementiae nostrae regit temperamentum, in tali volumus religione versari, quam divinum Petrum apostolum tradidisse Romanis religio usque ad nunc ab ipso insinuata declarat quamque pontificem Damasum sequi claret et Petrum Alexandriae episcopum virum apostolicae sanctitatis, hoc est ut secundum apostolicam disciplinam, evangelicamque doctrinam patris et filii et spiritus sancti unam deitatem sub parili maiestate et sub pia trinitate credamus. Hanc legem sequentes Christianorum catholicorum nomen iubemus amplecti, reliquos vero dementes vesanosque iudicantes haeretici dogmatis infamiam sustinere, divina primum vindicta, post etiam motus nostri, quem ex caelesti arbitrio sumpserimus, ultione plectendos.* On details see Baudy 2001.

85 *Cod. Theod.* 16.10.12: *Nullus omnino ex quolibet genere ordine hominum dignitatum vel in potestate positus vel honore perfunctus, sive potens sorte nascendi seu humilis genere condicione fortuna in nullo penitus loco, in nulla urbe sensu carentibus simulacris vel insonem victimam caedat vel secretiore piaculo larem igne, mero genium, penates odore veneratus accendat lumina, inponat tura, sarta suspendat. 1 Quod si quispiam immolare hostiam sacrificaturus audebit aut spirantia exa consulere, ad exemplum maiestatis reus licita cunctis accusatione delatus excipiat sententiam competentem, etiamsi nihil contra salutem principum aut de salute quaesierit. Sufficit enim ad criminis molem naturae ipsius leges velle rescindere, illicita perscrutari, occulta recludere, interdicta temptare, finem quaerere salutis alienae, spem alieni interitus polliceri. 2 Si quis vero mortali opere facta et aevum passura simulacra inposito ture venerabitur ac ridiculo exemplo, metuens subito quae ipse simulaverit, vel redimita vittis arbore vel erecta effossis ara cespitibus, vanas imagines, humiliore licet muneris praemio, tamen plena religionis iniuria honorare temptaverit, is utpote violatae religionis reus ea domo seu possessione multabitur, in qua eum gentilicia constitit superstitione famulatum. Namque omnia loca, quae turis constitit vapore fumasse, si tamen ea in iure fuisse turificantium probabuntur, fisco nostro adsocianda censensus. 3 Sin vero in templis fanisve publicis aut in aedibus agrisve alienis tale quispiam sacrificandi genus exercere temptaverit, si ignorante domino usurpata constiterit, viginti quinque libras auri multae nomine cogetur inferre, coniventem vero huic sceleri par ac sacrificantem*

The decree contains a wealth of detail, though the prohibition of sacrifice alone made the exercise of pagan religion impossible.⁸⁶ It was, of course, not so simple to outlaw a religion, since any given ritual action can be reinterpreted, while inner dispositions are hardly subject to proof. For these reasons, perhaps, the law was constructed in such a way that unpopular persons could be convicted, even if nothing comparable to high treason could be proved against them.⁸⁷ The inspection of sacrificial victims as such gave sufficient grounds for punishment, since it could be connected, in potentiality as well as through supposition, with an inquiry into the emperor's well-being. Any conceivable excuse is likewise declared invalid in advance, which makes the ordinance a most efficient instrument of totalitarian rule, especially since it makes the failure to inform a punishable offence, too.

5 Some consequences

Despite Julian the Apostate's attempt to return to older practices, the historical process presented here in outline continued to follow a uniform trend: restrictive measures directed against individual groups or particular practices gave way to general prohibitions of the previously-customary religions. In this way, the victory of Christianity over the so-called pagan religions harmonized with the totalitarian tendencies of Late Antique politics. The imposition of a monotheistic state religion accompanied the suppression of the identity-creating symbols and behavioral structures of subordinate civic centers.⁸⁸ The language of warfare and suppression was in this arena often literalized: from Constantine on, destroying temples was a common measure – and a profitable one, politically and financially – taken by the rulers.⁸⁹ Last but not least, the abolition of the pagan sacrificial system and of the practices of divination connected with it, along with the destruction of cult sites, served to eliminate the germ-cells of any possible opposition.⁹⁰ In this manner, vast empires could be ruled more easily.⁹¹

At the dawn of the Christian West stands, therefore, not only the regulation through law of the one true religion, but also the legal prohibition of other religions.⁹² We have to consider this aspect, if we want to write a «religious history of Europe».⁹³ Of course, the

poena retinebit. 4 Quod quidem ita per iudices ac defensores et curiales singularum urbium volumus custodiri, ut ilico per hos comperta in indicium deferantur, per illos delata plectantur. Si quid autem ii tegendum gratia aut incuria praetermittendum esse crediderint, commotioni iudicialiae subiacebunt; illi vero moniti si vindictam dissimulatione distulerint, triginta librarum auri dispendio multabuntur, officiis quoque eorum damno parili subiugandis. – Fögen 1993: 317 examines the «semantics of illegal inquiry» in this text; Cancik 1995: 191 accurately calls the law the «complete prohibition of the Roman religion».

86 For a subtly differentiated view cf. Gladigow 2000: 102 ff.

87 A mechanism that takes effect in a very similar manner, in witch hunts.

88 Cf. Brown 1995: 31, 146 f.

89 On this see Metzler 1981.

90 Cf. Noethlichs 1986: 1153.

91 See Peterson 1935: 78 ff.; cf. Gottlieb 1992: 99f.; Momigliano 1987, 142–158.

92 Mensching 1955, newly edited by Udo Tworuschka with an introduction by Hans Küng (Mensching 1996) defines the beginning of the Christian state and church history of Europe as the «Toleranzedikt, das im Jahre 313 n. Chr. Konstantin und Licinius in Mailand verkündeten.» One should not forget, however, that Christianity was the object, not the subject of the «granting of toleration» (*Toleranzgewährung*). On the suppression of deviant forms of Christianity in late antiquity, see also Karl Leo Noethlichs' contribution to this volume.

93 Regarding the concept of a «European history of religion» see Gladigow 1995.

replacement of ancient, so-called <pagan> religions by Christianity did not occur without a struggle, in which coercion played a significant role. It is not that a declining epoch faded away without a struggle,⁹⁴ while the seed of the new thrived and was gratefully welcomed. To give but one example, there were street battles in Alexandria, in the course of which the philosopher Hypatia was stoned to death, and people who practiced the ancient religion were threatened and indeed punished by force of law.⁹⁵ The process depicted here in outline deserves more precise analysis. If one were to extend this inquiry to the Middle Ages and the Early Modern period, one would have to ask to what extent the political measures that decisively shaped the religious history of Europe used ancient models and under which historical circumstances modifications were made.⁹⁶

When, in 380 CE, Christianity was prescribed as the sole religion of the Roman Empire, binding for every citizen, this compulsory measure was accompanied by a whole series of prohibitions of other religious practices and communities. As we have seen, only a few years earlier, a law prohibiting sacrifice had threatened transgressing <pagans> with death. In 392, another law forbade in great detail all non-Christian ritual acts. Thus was created the legal framework not only for criminalizing the traditional religions of the ancient Mediterranean, but also for gradually eradicating the Celtic, Germanic, and Slavic religions. The foundation of the Christian Occident had been laid. With the overseas conquests that followed, this prohibition of religion – unique in its all-encompassing nature – gained global importance. Thus, ancient religious policy set the pattern for the state's treatment of religions, which has remained in effect until the modern age and beyond. In today's pluralistic societies, an awareness of this historical heritage should be useful in dealing with conflicts between the state and the various religious communities.

94 On the concept of decline see Cancik 1986; idem 1995; cf. Ando 1996: 171–176; idem 2001: 369–375.

95 On the <drama> of these clashes see Baudy 1992: 75 ff.; Hahn 2004. On Hypatia see Brown 1995: 149 ff.; Dzielska 1996.

96 McCormack 1991 is an exemplary essay of this kind.

Chapter 7

Revolution from the top? <Orthodoxy> and the persecution of heretics in imperial legislation from Constantine to Justinian

by

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1 The question

Imagine a modern, liberal, secular state passing a law, stipulating a certain belief. We would consider such an intervention absurd and reject it because it would clearly infringe upon a human right, namely the vested human right of religious freedom. But the situation is quite different in non-secular states with a particular state religion, where such paternalism is not only imaginable but practiced. A similar phenomenon is to be found in the late Roman <Christian> empire, where principles of faith were legally fixed. How could this happen? What were the political and religious conditions that brought this about?

2 The legal basis till Constantine

According to the historical myths told of its foundation, Rome had from the start been a state governed by the rule of law, based on unwritten or written legal norms referred to as the *leges regiae*. The law further provided means for the integration of new citizens (and new territories), whose individual commitments to Rome's language or political system – factors that we might consider important – seem to have played no or a minor role only.¹

The most important means of integration was the extension of the franchise, which was used calculatedly up to 212 CE, when Caracalla granted it to (almost) all freeborn residents of the empire, supposedly to increase the revenues of the state from certain special taxes paid only by Roman citizens, or so Cassius Dio tells us (77.9.4 f). With the *Constitutio Antoniniana*, Roman civil law, the *ius civile*, as the most specific form of the *ius privatum*, was applied to all inhabitants of the empire apart from the *dediticii*.² According to Roman jurists, the *ius civile* derived from the *ius naturale* and the *ius gentium*, from natural law and the law of nations, and formed the specific law of a specific city, governing relations between members of its community of citizens. This formulation had no impact upon conceptions of *ius publicum*, the law of a people as corporate body, although both bodies of

1 An early example is the *vetus Claudia tribus* in Livy 2.16.4 f.: see Noethlichs 1996: 27–32.

2 Wolff 1976: 115 ff.

law were held to be anchored in divine law (*Dig.* 1.1.2). The *ius publicum* embraced not only magistrates but also *sacra (publica)* and *sacerdotes*, i. e., religious rites and priesthoods (*Dig.* 1.1.1.2). Initially this body of law was held valid within a conjunction of personal and territorial status – that is, it applied to Roman citizens within Roman territories, in Rome itself, and in Roman citizen colonies. It was, therefore, not before the *Constitutio Antoniniana* that this notional territory was expanded right to the borderlines of the Empire. It was this expansion of a once restricted <vertical> relationship between state and citizen that offered new scope for government decrees, and also for religious legislation.

In fact, Rome had a long tradition of state interference in matters of cult, seemingly on the basis of *ius publicum*, beginning with Appius Claudius Caecus in 300 BCE and continuing through Diocletian. Its details need not be rehearsed here.³ We should only recall that such interference never prescribed <belief> in its substance. It consisted, rather, in regulations of cult in two related fields: correct behavior toward the religion of the Roman people and the management of foreign influences. Cicero distills for us in *De natura deorum* the essence of this system. There Quintus Lucilius Balbus, the representative of the Stoa, answers the speech of the *pontifex maximus* Cotta: <It is for me to fight, together with you, for altar and hearths, for the temples and shrines of the gods, and also for the walls of the city, which you priests declare to be sacred, even if you keep it safer through religious action than by those same walls. To give all this up would be a desecration, in my view, as long as I can breathe>.⁴ Balbus delineates clearly the main interest of Roman cult: not individual belief, but rites around one's home, the temples of the gods, and the town itself as the enlarged home. <Cult> always included a concrete locality.⁵

Within this framework, reproaches against the Christians can be seen as falling within the ambit of <sacrilege>, and their legal basis, if not arson or obstinacy (*pertinacia, obstinatio*), then deviance and thus the wrong behavior towards the gods. Christians were therefore threatening the *salus populi Romani*. In the name of this *salus rei publicae* several persecutions of Christians occurred either locally or throughout the whole Empire from the middle of the third century onwards. They took place in the course of the state's seeking individual expressions of a common loyalty, a condition for all citizens since the *Constitutio Antoniniana*. But with the edict of Galerius in 311 CE the persecutions ended and, in 313 CE, the religious policies of the court changed explicitly in favor of Christians. Christian writers, beginning with Eusebius and ending with Sulpicius Severus at about 400 CE, were effusive in their praise of this moment as the beginning of a new age. The latter in particular emphasizes that moment as constituting an end to all persecutions, in every respect, until the Antichrist would appear at the end of times.⁶

Reality, however, was rather different and Sulpicius Severus was quite aware of this.⁷ New persecutions emerged not only of so-called <pagans> – Jews were less affected – but of

3 See Rüpkke 2001: 37–45; Krauter 2004: 279–304, esp. 291; and Baudy in this volume.

4 Cicero *Nat. d.* 3.94.

5 The connection between pontifical law and territory (*ager Romanus*) seems to be neglected a little bit by Stepper 2003: 242–249.

6 E. g. Eusebius *Hist. eccl.* 10.1.2; Sulpicius Severus *Chron.* 2.33.

7 The chronicle ends specifying the motivation that caused a permanent war in the so-called Priscillianist quarrel (2.51.8–10): *At inter nostros perpetuum discordiarum bellum exarserat, quod iam per quindecim annos foedis dissensionibus agitatum nullo modo sopiri poterat. Et nunc, cum maxime discordiis episcoporum omnia turbare ac misceri cernerentur cunctaque per eos odio aut gratia, metu, inconstantia, invidia, factione, libidine, avaritia, arrogantia, somno, desidia depravata, postremo plures adversum paucos bene consulentes insanis consiliis et pertinacibus studiis certabant: inter haec plebs Dei et optimus unus quisque probro atque ludibrio habebatur.*

deviants among Christians, who were labeled <heretics>.⁸ The Church Fathers found these internecine persecutions of Christians by Christians to be as bad as the persecution of Christians by pagans had been in earlier times, perhaps even worse.⁹ But how did this development begin and what was it all about?

3 Religious policy under Constantine

Constantine, the first <Christian emperor>, ultimately started a new kind of religious policy; at first, however, he effected no fundamental change but, in formal terms, at least, adhered closely to tradition. Traditionally, for example, the emperor was *pontifex maximus*, and this remained true until Gratian and Theodosius I. In this respect Constantine's actions in the first great schism in his dominion, the controversy in Africa between the orthodox and the Donatists, can be understood as expressions of his pontifical authority.¹⁰ In fact, the emperor really had no intention of making a decision himself. But when the bishops proved unable to make up their minds who represented <true> Christianity, the emperor was compelled by his official status to act. His letter of 316 CE to the North-African *vicarius* Celsus is revealing; it ends with Constantine's declaration that he had carefully examined the question and had come to a conclusion that was both nearer to the truth and more useful for religion. So he himself would demonstrate how the sacraments were to be performed. And what was more the emperor's duty than to stop discussion about mistakes and to offer the people the true religion, a united simplicity (*concoris simplicitas*), and a form of cult appropriate to the almighty God?¹¹

It is remarkable that Constantine here only refers to *munus principis*, the duty of an emperor in general, and not specifically to his duties as *pontifex maximus*. Eusebius makes Constantine's position, as defined by the emperor himself, clearer still in his *Life of Constantine*, by noting that Constantine prohibited pagan temples and sacrifices across the whole empire, but gave orders that Sundays were sacred and commemoration days of martyrs and feasts were to be celebrated (4.23). Constantine was therefore quite right, according to Eusebius, to call himself a <God-appointed bishop for external affairs> (4.24). Here we can already observe a division between the old functions of the *pontifex maximus* and the clerical duties of the Church. The Christian emperor seemingly fulfilled the traditional functions of the pontificate, as they had been defined in respect to his non-Christian subjects, without any specific consideration for his role in Church affairs – at least in theory.

Thus, at first, the regulations laid down at the imperial level for the true faith seem to have concerned only <external> cult. Constantine does not say what internal principles influenced his decision. Presumably he accepted the majority vote of the bishops at the synods of Rome in 313 and Arles a year later.

8 Brox 1986: 255–283. On differentiating <heresy> and <schism>, see Greenslade 1953 and Bonner 1999.

9 Rufinus *Hist. eccl.* 11.3.10; Socrates *Hist. eccl.* 2.27.38; 7.3.15.

10 On the general role of the Emperor as *pontifex maximus* see Stepper 2003: 194–197, concerning Constantine. For another view, see Rüpkke 2005: 1601–1616.

11 Optatus appendix 7 = von Soden 1913: 36 no. 23: *...sum diligentissime quaesiturus idque iudicaturus, quod verissimum et religiosissimum esse manifestum sit, demonstraturus etiam hisdem, qui et qualis divinitati cultus adhibendus sit. ... quid potius agi a me pro instituto meo ipsiusque principis munere oporteat, quam ut discussis erroribus omnibusque temeritatibus amputatis veram religionem universos concordemque simplicitatem atque meritam omnipotenti deo culturam praesentare perficiam?* The role of the emperor within the Church, however, can be comprehended as the 'secular branch' as Theodosius I and his successors understood themselves.

But the Donatist controversy was not the last to draw the emperor's attention. After gaining control over the whole Empire in 324, Constantine was confronted with the so-called 'Arians'. This conflict involved an entirely new dimension, namely, the specific contents of Christian theology, and in particular, definitions of the Trinity. In what follows, I shall trace the history of persecution under the Christian emperors of late antiquity, concentrating in particular on the legal justifications offered for state actions. For no matter what criteria Constantine adopted in deciding between orthodoxy and heresy and who his clerical advisors were, those criteria were obviously the reasons for persecuting heretics. And in light of that fact, separate pieces of legislation against pagans and Jews are here set aside, as it was always sufficient at the time merely to cite the truth of Christianity itself to justify those actions. That was true regardless of which Christian denomination was involved.

The evidence at issue is the collection of laws that Theodosius II caused to be compiled in the *Codex Theodosianus*, named after him.¹² These laws are edited and truncated versions of much longer pieces of legislation,¹³ and thus throw a certain normative light – albeit a fragmentary and rather theoretical one – on the Christianization of the Roman empire under the various emperors from Constantine to Theodosius II.¹⁴ What often cannot be reconstructed is the specific definition of 'orthodoxy' that motivated or framed any particular action; if any such was specified, the compilers of the *Codex Theodosianus* made no effort to preserve it.¹⁵

But first we must step back and ask what the legal justifications for a 'persecution' of dissenters were, and what we should understand by 'persecution'.

4 Legal justifications of a persecution of heretics

Consider again the difference between *ius publicum* and *ius privatum*: it is intrinsic to *ius gentium*, that is, the law embracing all human beings (as opposed to all other creatures, who fall under *ius naturale*) that persons may defend themselves against violence and injustice. As all humans have a common natural relationship,¹⁶ it can be deduced from Roman legal theory that it is unjust to persecute anybody. To the extent that persecution entails violence, its justification is quite irrelevant.

The persecution of heretics can therefore only be legalized by the *ius publicum, quod ad statum rei Romanae spectat*, the *ius publicum*, 'which regards the condition of the Roman state' (Dig. 1.1.1.2), i. e., the law that sets the individual against the state.

From this perspective, an offence against cult is always 'public'. But this does not mean that one may act privately as one wishes. The traditional Roman religious calendar observed a strict separation between public and private feasts, but those bore a necessary and complementary relation to each other. That is why uncontrolled private actions must

12 For a summary see Zinser 2002: 215–219.

13 For the most part, the overly-detailed introductions, often with juridical reviews or religious arguments at great length or the reasons for special measures were deleted. The posttheodosian or Justinian novella or the *Edict against Manichaeism* by Diocletian (*Mosaic. et Roman. Legum Collatio* 15.3.1) can serve as examples for completely conserved texts.

14 See Hunt 1993, who shows the limits of perception. For the 'real' level of Christianization, on the basis of three chosen examples (Alexandria, Antiochia, Gaza), see now Hahn 2004.

15 Von Stuckrad 2002 points out how difficult it is to draw a line in view of a 'discursive science of religion'.

16 Dig. 1.1.3: *cum inter nos cognitionem quondam natura constituit*.

have seemed very suspicious and could be revenged on the legal grounds of the *ius publicum*.¹⁷ But how is 'persecution' defined now, in the Christian era? The ecclesiastical historian Socrates gives an interesting definition when examining the religious politics of the emperor Julian: persecution covered not simply bodily harm, but also the effects of 'alarming' people who had heretofore been living in peace. His definition thus embraced all the indirect actions that Julian took in his effort to harass Christians while not creating Christian martyrs.¹⁸

Within these manifold legal and religious repressions, those against 'heretics' have a special place, precisely because Christians persecuted Christians on so many different grounds throughout the fourth century, depending on the specific influence of clerical advisers and their views of what was the true creed or who was a heretic.¹⁹ As I observed above, it was the clerical circle around the emperor that initiated religious coercion. Starting with Constantine, the Christians themselves had the opportunity to define the criteria by which the state would justify acting against heretics, as well as to define who the heretics were; nor did the fathers of the Church shy from using their influence to give public form to their ideals of an 'orthodox' society. These debates were often a question of power-politics, with many shades.

But I must stress again, that with the arrival of the Christians at the center of power, these debates took on a new urgency and a new form, the result of a seeking after an 'absolute truth', the fruit of combining monotheism, Judaism, and Hellenic philosophy. This need is given particularly pithy expression in the reply of Ambrose to the third *Relatio* of Symmachus who, as Prefect of the city of Rome had intended to re-establish the old cults in Rome. Ambrose wrote, '(Symmachus) claims that "such a sublime secret may be attained by more than one path." But we Christians know through God's voice what you (pagans) do not. What you seek by means of these vague notions, we hold as secure knowledge, from the very wisdom and truth of God.'²⁰

This reasoning threatened to subvert the desire for social order from its place of preeminence; indeed, in such arguments social order itself was reclassified as a merely political good, and hence subordinate. But the argument might be taken still further. The state could not tolerate heretics because the *salus reipublicae* was traditionally linked to proper cult and – from now on – to true worship, regardless whether the non-orthodox 'kept quiet'. This combined stress on internal belief and external forms was characteristic of Christendom and was, by the way, taken up by the Emperor Julian, who tried to enforce it upon his priests (see especially *Ep.* 89).²¹

From this time on, these two aims, those of social order and of true worship, were in conflict throughout the Christian empire.²² In the course of the fourth century and even

17 The problem was still clear in Constantine's legislation on *haruspices*, where private and uncontrolled actions were forbidden: *Cod. Theod.* 16.10.1.

18 Socrates *Hist. eccl.* 3.12.

19 See, e. g., Sozomen, *Hist. eccl.* 1.1.15.

20 Ambrose *Ep.* 18.8: *Uno, inquit, itinere non potest perveni ad tam grande secretum. Quod vos ignoratis, id nos dei voce cognovimus. Et quod vos suspicionibus quaeritis, nos ex ipsa sapientia dei et veritate compertum habemus*.

21 See Stepper 2003: 201–207; whose arguments concerning the consequences of the refusal of the title *pontifex maximus* I don't share, particularly since she dates the refusal in to 383, which creates a gap of 20 years (210–223). She connects this step with Gratian's anti-pagan measures, although emperors like Constantius who still had the title did just the same. In any case we must assume an increasing 'sensitivity' as a precondition for the refusal.

22 Theodosius, for example, protected Jews and pagans, but not heretics, against Christian persecutions, as long as they stayed quiet, in 423 (*Cod. Theod.* 16.10.24).

more in the fifth, the struggle to differentiate between orthodoxy and heresy occupied a dominant place in all of law making regarding religion, displacing, at least momentarily, the more strictly political desire for law and order. It took some time to reconcile them once again. Let me quote Augustine on how the Church should treat heretics. In book 18 of *The City of God*, he dwells on the benefit orthodox society accrues from the presence of «heretics»: they are a challenge to show patience and kindness, because we must love our enemies. But sometimes «dreadful punishments» are necessary.²³ The new mentality of Christianity is recognizable by contrast with the old Roman conception of religion. In this context Augustine mentions a special form of «persecution»: it occurs when heretics who, of course, understand themselves as part of Christianity, having the Holy Scriptures, the sacraments and confession of faith, try to influence other Christians or non-Christians wanting to convert. These heretics use neither corporal punishment nor threats thereof, but their corrupt customs and human errors take hold of minds: their actions thus constitute a persecution not of bodies but of souls.²⁴ Here Augustine and Socrates seem to share a very similar definition of «persecution.»

We can easily imagine that if the distribution of power were different, heretics might apply this definition of «persecution» to their opponents as well. The distinction between orthodoxy and heresy is therefore mainly a question of power, and in its social expression imperial legislation plays a key role. In accordance with the stress laid by Ambrose upon inner belief rather than external forms, the rhetoric and attention of imperial legislation came to stress a purely internal conception of faith. Conventional law, with its focus on action, was transformed into a sort of penal law focused on intent.

5 Examples for legal persecutions of heretics

This process may be traced by legal examples from the reign of Constantine to the reign of Justinian.²⁵ As was shown above, the legal persecution of «schismatic behavior» began already with Constantine, being first directed against the Donatists and later, when Constantine became sole ruler, against all *haeritici atque schismatici* (*Cod. Theod.* 16.5.1, from 326 CE). No distinction between individuals or forms of belief is recognized. Eusebius mentions a law against *Novatiani*, *Valentiniani*, *Marcianistae*, *Pauliani* and *Phryges*, in short «all who form sects», who were forbidden to come together and whose assembly rooms were confiscated (*Vita Const.* 3.64–65). This edict is still cited a hundred years later by Sozomen (*Hist. eccl.* 2.32.2–6).

Allow me to digress chronologically, in order to examine how Sozomen, a lawyer and therefore legally trained, understood and exploited imperial legislation. It is amazing how

23 Augustine *De civ. D.* 18.51.1: *Inimici enim omnes Ecclesiae, quolibet errore caecentur vel malitia depraventur, si accipiunt potestatem corporaliter affligendi, exercent eius patientiam; si tantummodo male sentiendo adversantur, exercent eius sapientiam; ut autem etiam inimici diligantur, exercent eius benevolentiam, aut etiam beneficentiam, sive suadibili doctrina cum eis agatur, sive terribili disciplina.*

24 Augustine *De civ. D.* 18.51.2: *Ipsi quoque haeretici, cum cogitantur habere nomen et sacramenta christiana, et Scripturas, et professionem, magnum dolorem faciunt in cordibus piorum: quia et multi volentes esse Christiani, propter eorum dissensiones haesitare coguntur, et multi maledici etiam in his inveniunt materiam blasphemandi christianum nomen; quia et ipsi quoque modo Christiani appellantur. His atque huiusmodi pravis moribus et erroribus hominum persecutionem patiuntur, qui volunt in Christo pie vivere, etiam nullo infestante neque vexante corpus illorum. Patiuntur quippe hanc persecutionem, non in corporibus, sed in cordibus.*

25 See, e. g., Humfress 2000; La Boulluec 2000.

many edicts are mentioned or quoted in his text, not only those concerning «heretics», but those regarding the full gamut of religious politics. He seems to have felt it deeply important to represent canonical decisions as falling within the emperor's jurisdiction.²⁶ Consequently, his most important sources are imperial laws, followed by synodical or similar texts (*Hist. eccl.* 1.1.13). This is wholly consonant with the tenor of his work, which is dedicated to Theodosius II (see *Hist. eccl. Logos* 17). Even if the history of the Church is not a man-made matter (*Hist. eccl.* 1.1.12), the emperor is the connection between the two worlds, which Augustine named *civitas terrena* and *civitas dei*. For Sozomen, the two areas are in perfect accord in imperial legislation.²⁷ He asserts that the edict against heretics mentioned by Eusebius was intended only to intimidate and that the emperor had no real interest in exacting the penalties. At least verbally, however, Constantine toyed with the idea of wiping out those sects by public punishments, that is to say, through legal action. A more searching analysis of Constantine's law reveals the emperor's interests to have been thoroughly traditional. He is interested in external unity and opposes «damned and fatal dissension» (*Vita Const.* 3.65). That is why contravention meant confiscation of assembly rooms: they were the outer, institutional markers of different variations of faith.

This law is not found in the Theodosian Code. In the first anti-heresy edict there (*Cod. Theod.* 16.5.1), all heretics and schismatics are cursed altogether. They are divested of all privileges and saddled with special taxes. The measures taken in *Cod. Theod.* 16.5.2 show quite clearly not only how far the emperor relied on his clerical-theological advisors, but also that there must have been an earlier edict that confiscated the church buildings and cemeteries of certain heretics, for these were now handed back to the Novatians. Unfortunately, the law tells us nothing about their credal statement or why they were deemed less damnable, sufficiently so that they successfully reacquired their buildings. The same elision is present in the law against heretics quoted by Eusebius. Despite many a wordy and bombastic phrase, the Emperor avoids tackling the problem of orthodoxy altogether.

6 Definitions of orthodoxy by Theodosius I

The first attempt to provide a real definition of orthodoxy waits until 28 February 380, when Theodosius I promulgated the text excerpted as *Cod. Theod.* 16.1.2. In the years between those pieces of legislation the Council of Nicaea had convened, as well as several further assemblies of bishops under the sons of Constantine. On the one hand, these were episodes in a vivid, occasionally violent debate about the various divine persons; at an institutional level, on the other, they were a consequence of power politics and an evolving conception of the church and who its proper representative was. In theory, at Nicaea and in its aftermath, the Church gave the emperor a brief as to how to shape his religious legislation. What is more, Constantine is said to have participated in its production. In practice, however, the Nicene creed gave rise to a variety of philosophical and theological

26 See allusions to imperial laws with Sozomenos: 1.5.2; 1.8.3–5; 1.9.3–7; 1.20.2; 1.21.4; 2.32.2–6; 3.17.2–5; 5.5.2; 6.3.4–6; 7.1.3; 7.4.4–6; 7.6.7; 7.9.5–7; 7.12.11 f; 7.13.7; 7.16.7–11; 7.20.2; 7.25.7; 8.4.9; 8.7.3; 8.8.5; 8.24.12; 9.4.1; 9.5.7; 9.8.10.

27 For the working method of Sozomen see Leppin 1996: 244–252. For the different interests of Sozomen and Socrates, see Urbainczyk 1997. I have not found any hint on the aspect in the text given above.

interpretations; the nature of the personhood of Christ was a particular point of controversy. In the second part of the fourth century the landscape became more complicated still, when a third holy person was introduced, namely, the Holy Spirit. The emperors of East and West adopted different camps, each usually taking the side represented by the majority in his part of the Empire.

An exception to this rule was the «orthodox» Theodosius I, who succeeded the «Arian» Valens in the East in 378 CE, and who tried to reconcile the opposed parties in *Cod. Theod.* 16.1.2 (*cunctos populos*).²⁸ The importance of this attempt to settle religious disagreements can be seen in the fact that Justinian used just this edict to open his *Codex Justinianus* (*Cod. Iust.* 1.1.1). In essence, Theodosius attempted to define the true creed in two significant respects, namely, in its wording and interpretation. First, as regards wording, the main point of dispute over the previous two generations, he cited as orthodox the Apostle Peter (whatever St. Peter may have understood by Trinity) and, along with an uninterrupted tradition, his Roman successor Damasus and Peter, the bishop of Alexandria. Second, he appended to this formula an interpretation of the Trinity, allegedly in accord with apostolic discipline and evangelic doctrine: there is a single Deity of the Father, the Son, and the Holy Spirit under «the concept of equal majesty and of the Holy Trinity».²⁹

What made an emperor pass a law defining Christian doctrine in its details? To answer that question, we must consider the circumstances under which Theodosius assumed his position, which caused him to plunge into both a strange religion and a foreign language. Sozomen (*Hist. eccl.* 7.4.5) comments that the Emperor wanted to avoid the imposition of a novel confessional form against on the unwilling and therefore issued this edict from Thessaloniki to the people of Constantinople. From there, it was supposed, the text would spread throughout the whole Empire. The episode smacks of a trial balloon.³⁰

We must also recall that Theodosius was the first emperor not to hold the title of *pontifex maximus*. To be sure, the refusal to bear this title (probably undertaken together with Gratian) seems to have caused little controversy, at least for the Christian majority. Indeed, the pagan Zosimus alone mentions the «rejection of the priestly vestment». Nevertheless, with the failure of the office, the unity of cult and politics was abandoned, at least as a matter of *ius publicum*. At the same time the Emperor renounced the power to intervene directly in *religio* and *sacra publica*, a privilege of emperors since Augustus. Even bracketing the heightened Christianization of the empire and the growing importance of bishops, particularly Ambrose, this decision seems to have been a consequence of Gratian's orthodoxy. He is said to have announced that for a Christian it would be illegal to wear such a cassock.³¹ From this perspective, the emperor as layman had to submit to the Church in questions of religion. The *civitas dei* had precedence over the *civitas terrena*. The victory of this point of view was made public in the penitential pilgrimage to Milan undertaken by Theodosius; this is true even though the event does not seem to have interpreted in so fundamental a fashion at the time, the excesses of Theodoret notwithstanding.³²

28 See Errington 1997 for how the ecclesiastical historians judged the religious legislation of Theodosius I.

29 *Cod. Theod.* 16.1.2. *pr.*: ... *hoc est, ut secundum apostolicam disciplinam evangelicamque doctrinam patris et filii et spiritus sancti unam deitatem sub parili maiestate et sub pia trinitate credamus.*

30 The experimental stage of the early Theodosian religious legislation is also emphasized by Leppin 2003: 68–76.

31 The passage, handed down only by Zosimos 4.36.5 in my view can best be related with both Gratian and Theodosius in 379: see Noethlichs 1971: 198–202 (Exkurs I); Steppin 2003: 211–223, with a different date (383); Leppin 2003: 82 and 246, n. 84. On this probably unspectacular action see also Errington 1997: 33 n. 63, and Rüpke 2005: 1612–1614.

That said, the attempt to produce harmony by defining orthodoxy represented by *Cod. Theod.* 16.1.2 remained abortive, not least because its language so clearly fell short of contemporary clerical debate. The edict (*Cod. Theod.* 16.5.6) issued on 10 January 381, made definite progress. In connection with the heretics named there,³³ the emperor tried to provide a positive statement of the true Creed, referring to Nicaea and quoting verbatim passages of the texts produced there: a true adherent of the Catholic religion is the man «who confesses that Almighty God and Christ the Son of God are one in name, God of God, Light of Light, who does not violate by denial the Holy Spirit which we hope for and receive from the Supreme Author of things; that man who esteems, with the perception of inviolate faith, the undivided substance of the incorrupt Trinity, that substance which those of the orthodox faith call, employing a Greek word, *ousia*».³⁴ Living or dead witnesses of the true belief are missing here.

They, however, do play a role in *Cod. Theod.* 16.1.3, from 30 July 381. This edict takes over the resolutions of the ecumenical council of Constantinople as secular right but imposes them only upon Theodosius' east. Both Socrates (*Hist. eccl.* 5.8.13–20) and Sozomenos (*Hist. eccl.* 7.9.5–6) know about the edict. Again, as he had in *Cod. Theod.* 16.1.2, Theodosius attempts to define orthodoxy in a twofold way, by reference to authoritative texts, on the one hand, and to living witnesses on the other:

We command that all churches shall immediately be surrendered to those bishops who confess that the Father, the Son, and the Holy Spirit are of one majesty and virtue, of the same glory, and of one splendor, to those bishops who produce no dissonance by unholy distinction, but who affirm the concept of the trinity by assertion of three persons and the unity of the Divinity.³⁵

Alongside this definition, which in many respects hearkens back to *Cod. Theod.* 16.5.6, the emperor specifically indicates the bishops of the two largest cities in his territory, Constantinople and Alexandria, as well as those in Laodicea and Tarsus and many further towns in Asia proconsularis, besides the dioceses of Asia and Pontos. This very deliberate and explicit selection must have been intended to denominate just those who, in the emperor's view, represented orthodoxy in the East.

Some years later, however, Theodosius restricted himself to quoting the councils of Rimini (359) und Constantinople (360) when he decreed that some previously problematic sects were allowed to assemble again. He further warned against anyone disturbing the public peace, supposing they were allowed to meet and others not. Anyone instigating a riot or disrupting the Church would be guilty of treason and punished with death (*Cod. Theod.* 16.1.4 = 16.4.1, from 23 January 386). Here we can see that the pre-Christian link between cult and state had never fully been severed, even if the emperor was no longer the *pontifex maximus*. In his appeal to the authority of the Councils, and his claim to uphold the public peace, Theodosius remains the «secular arm» of the Church, the successor to Constantine as «bishop for external affairs» (Eusebius *Vit. Const.* 4.24; see above, p. 117).

32 Theodoret *Hist. eccl.* 5.18.5, 25; as a representative see only Leppin 2003: 154–161.

33 Sozomen (*Hist. eccl.* 7.12.11 f.) tells us that Theodosius in *Cod. Theod.* 16.5.11–15 only wanted to intimidate people without revealing his source.

34 *Cod. Theod.* 16.5.6.2: ... *qui omnipotentem deum et Christum filium dei uno nomine confitetur, deum de deo, lumen ex lumine: qui spiritum sanctum, quem ex summo rerum parente speramus et accipimus, negando non violat: apud quem intemeratae fidei sensu viget incorruptae trinitatis indivisa substantia, quae Graeci adsertione verbi ousia recte credentibus dicitur.*

35 *Cod. Theod.* 16.1.3: *Episcopis tradi omnes ecclesias mox iubemus, qui unius maiestatis adque virtutis patrem et filium et spiritum sanctum confitentur eiusdem gloriae, claritatis unius, nihil dissonum profana divisione facientes, sed trinitatis ordinem personarum adsertione et divinitatis unitate.*

This phase in imperial legislation came to a close with *Cod. Theod.* 16.4.2, published on 16 June 388. It forbade any public debate on questions of faith. Christian theology having reached a certain level, the interest of the state in peace and order was enforced again; questions of individual belief were simply set aside.

7 Peak of the imperial definition of orthodoxy under Justinian I

For a long time thereafter, no further attempt to define the faith was made, at least on the part of the government, although this pattern should not be confounded with a lack of fighting among Christians.³⁶ It is simply imperial legislation that reveals a profound disinterest in these questions. Or might it be that such texts were omitted in the compilation of the Theodosian Code? The completely-preserved post-Theodosian novellae display, however, a similar, «negative» picture. A division of responsibility seems to have been observed.

This changed at the end of 534 CE, when the second edition of the *Codex Iustinianus* was published. The opening of that text illustrates the high position occupied by religion within the whole of the law: *De summa trinitate et de fide catholica et ut nemo de ea publice contendere audeat*, «Concerning the highest Trinity and the Catholic Faith and that no one should dare to debate them publicly» (*Cod. Iust.* 1.1; cf. Ando, this volume, p.126). Here both aims are joined once again: the theologically-correct definition of orthodoxy and the principle of law and order. The relevant edicts theretofore were *Cod. Iust.* 1.1.5, a general condemnation of Nestorius, Eutyches and Apollinaris, issued right at the beginning of Justinian's reign, probably in 527 CE; *Cod. Iust.* 1.1.6, from 533, another condemnation of the same heretics, addressed to the people of Constantinople and citing *Cod. Iust.* 1.1.5; *Cod. Iust.* 1.1.7, from the same year and addressed to the ecumenical Patriarch of Constantinople; and a year later *Cod. Iust.* 1.1.8, a reply in Latin by John, «the most divine Archbishop and Patriarch of Rome», who quotes at length Justinian's own self-justification and statement of the creed. All these laws confirm the Emperor's orthodoxy. Rome backed Justinian, and so he could enforce orthodoxy with the Church's blessing – a condition without precedent in this form.

These four Justinianic edicts together exhibit a further pattern. All four contain a definition of the true faith, one they hold in common. It is unique, where theological substance is concerned, and reflects discussion of the time after Chalcedon. The formula concerns the three divine persons (*hypostaseis*) in one entity (*ousia*);³⁷ Christ and the Father are of one majesty; Christ was created by the Father before all times; he became a man, suffered, was crucified «under Pontius Pilate», and was resurrected.³⁸ With regard to the incarnation, he was equal to us, and yet the Trinity remained, even though one of them had become a human being. The unity of the Holy Trinity excludes a fourth person.³⁹ The Virgin Mary is declared as *theotokos*, as the woman having born the God Jesus Christ. *Cod. Iust.* 1.1.7 furthermore alludes to the councils of Nicaea, Constantinople, Ephesus and Chalcedon and their status, and the emperor, it is affirmed, will never deviate from this

36 See Gregory 1979; de Giovanni 1983/4.

37 See Bonner 1999, citing a passage of Hieronymus *Ep.* 15.3 (*CSEL* 54.64 f.) on the philosophical terms and vocabulary.

38 Special addendum in *Cod. Iust.* 1.1.6.

39 That refers to Nestorius, who interpreted the God Christus and the human being Jesus, born by Mary, as two different persons.

attitude. In addition, Justinian listed specific errors of the above-mentioned heretics, especially their theories of the Virgin Mary.

This culmination of legal orders directed towards the Creed actually marked the final stage in the development of imperial legislation on religion. The Justinianic novellae do not contain similar theological definitions. But this is no coincidence, as Justinian was a searcher all his life. He never found calm anywhere, including religion. This restlessness is surely due to the natural catastrophes he had to master during his reign.⁴⁰ His turn toward so-called Aphantodocetism at the end of his life bears witness to this quest. The emperor came to share the opinion of, say, Julian of Halicarnassus, that the body of Jesus Christ had been non-perishable already at his birth. Justinian is said to have tried to legalize that doctrine but this development was forestalled by his death.⁴¹

8 Conclusion

At this point my survey ends. I have argued that ever since Constantine, Christianization was carried out from the top, by imperial protection and legislation. My interest has been exclusively with attempts to define the «norm.» From a legal point of view, the Christian religion was an object and concern of *ius publicum*, as used to be true of *sacra*, of cult, in pre-Christian time. There were, of course, important developments: the interest of pagan Roman cult in space, mentioned by Cicero (see above, p. 116), was replaced by a universalizing interest in «mankind»; the task of determining correctness came to lie with the bishops rather than the *pontifex maximus*. The site of religious propriety, and hence of the state's interest, also changed. In theory, the basis of Christian cult was the concrete confession of faith; in reality, of course, Christian and pagan customs merged at the level of cult. The task of the «revolution from the top» was to police external forms of cult so that they harmonized with particular confessional forms, to produce a tight linkage between «inward» disposition and «outward» appearance. For this process to succeed, a rather complicated interplay was necessary. Theological ideas, pressure groups, economic factors, careerists and fellow travelers were needed to help the Church triumph, and imperial legislation prepared the way.

40 See Meier 2003: 273–293, 340 f., 638–641.

41 See Noethlichs 2000: 700 f.

Chapter 8

Religion and *ius publicum*

by

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1 Classical language and Christian religion in the codification of law

The two great codifications of law undertaken in Christian late antiquity are often presented as novel interventions in the history of religion. As the first such codification since the Twelve Tables a thousand years before, we are told, the Theodosian Code did more than advertise the maturation of imperial government; it aggressively highlighted that government's adherence to Christianity. For Theodosius departed from the precedent of the Twelve Tables by including in his Code a book on religion – the sixteenth and last; while Justinian did him one better by placing his book on religion first.¹

Even crediting their brevity, it is not possible to let these descriptions stand. Later in this paper I shall attempt somewhat more precisely to describe the ambitions of the Codes and to distinguish them from each other. For now, let me point out two things. First, neither text cites the Twelve Tables as a precedent though, oddly enough, each does cite precedents, and they not surprisingly differ in their practice in this regard. In light of their neglect, we ought eventually to seek the source of the privileged claim the Twelve Tables have had on the scholarly imagination. Second, neither Code actually describes any of its books as devoted to 'religion' in any catholic or totalizing sense of the word. Indeed, the Theodosian Code offers no titles for its books; the last chapter of book 16 is entitled *De religione*, 'On religion'; that book's first chapter is entitled *De fide catholica*, 'On the Catholic faith'.² The first chapter of the first book of Justinian's Code, on the other hand, bears the title *De summa trinitate et de fide catholica et ut nemo de ea publice contendere audeat*, 'On the highest Trinity and on the Catholic faith and that no one should dare to argue about it publicly'.³ The logic of their language betrays a clear anxiety that forms of religiosity other than Catholicism should not be embraced by any global category such as our 'religion'.⁴

These concerns aside, the gathering, editing and republication of laws on religion as part of corpora of law invite reflection on the place of religion within the concerns of law and government, as on the relationship between individual and corporate religious identities. What, for example, is the force of *publice*, 'publicly' in the title of chapter 1, book 1, of Justinian's Code? What is more, the incorporation of religion within the law's sphere of interest, and the logic of that action, must have enabled and might well have mobilized particular interactions between the government and religious minorities, regardless wherein the novelty of either late antique codification might have lain.

In this paper, I reflect on these questions and ways to answer them, primarily by directing attention to two problems whose importance is perhaps best clarified by recalling that the law of the empire was essentially classical law, regardless whether it served as basis or point of departure. Are we in that light to believe that, for whatever reason, religion had had no place in classical jurisprudence? Indeed, can we really be expected to believe that Rome itself functioned for a thousand years without systematically codifying its laws or rationalizing its legal system, despite almost unimaginable growth in the scope of its responsibilities? However incredible, these postulates are the necessary presuppositions of the view of law and religion in the Christian empire with which I began. On their reasoning, we confront in the pagan Roman empire a society that regarded neither law nor religion as essential to the maintenance of order, whether we define that negatively as the absence of public violence and private criminality, or positively as the adherence to a particular ethical code. My principal contribution in this paper will consist in asking how, when and why pagan and Christian Roman lawyers and legislators offered new theorizations of society and of the legal, social and religious ties that bound it together.

We might start by analyzing the ways discovered by Theodosius and Justinian to express the specifically religious dimensions of their legislative programs. We should have first to confess that neither codification was justified as a body of Christian law. Their authors identified their novelty and need by reference rather to the state of confusion then obtaining in the courts and schools of law.⁵ This is not to say that these were not Christian codifications, or that their Christian character was not flagged. Rather, I would emphasize how different were the means their authors adopted for inscribing their Christianity in their Codes. It would be easy and, I think, it would be wrong to argue that they had no precedent to follow, to argue, in other words, that they embarked on their projects *de novo* and that their codifications were, by virtue of being Christian, *sui generis*. One might as easily say that *qua* codifications of Roman law, the Codes merely collated a few hundred years of legislation, and that *qua* Roman codifications of law, the Codes of late antiquity had abundant precedent for accommodating religion within the interests of the law. I should like, moreover, to go one step further, and argue that the longevity and influence of codes of law rest very directly on the willingness and ability of their authors to make explicit the grounds of their normative power and on the contingent acceptance and appeal of those claims. The Conclusion of this paper will discuss the divergent fates of the codes of Theodosius and Justinian from precisely this perspective.

The emperors Theodosius II and Valentinian III announced their intent to produce a new codification of law on 26 March 429, the first and third sentences of which decree read as follows:

Ad similitudinem Gregoriani atque Hermogeniani codicis cunctas colligi constitutiones decernimus, quas Constantinus inclitus et post eum divi principes nosque tulimus, edictorum viribus aut sacra generalitate subnixas.

In imitation of the Gregorian and Hermogenian Codes, we order to be collected all the constitutions bearing the force of edicts or sacred general applicability, issued by the renowned Constantine and by the divine emperors after him and by ourselves.

1 Harries 1999: 14; Matthews 2000: 120, 290.

2 *CTh* 16.1 and 11.

3 *CJ* 1.1.

4 On *religio* see Ando 2003: 2–4, citing further work.

5 *CTh* 1.1.5 and 1.1.6.1; *NTh* 1.1–3; Justinian *De novo codice componendo* 2; idem *De Iustiano codice confirmando* 1; and esp. Justinian *Dig. praef. II (Omnem rei publicae nostrae sanctionem ...)*.

Sed cum simplicius iustiusque sit praetermissis eis, quas posteriores infirmant, explicari solas, quas valere conveniet, hunc quidem codicem et priores diligentioribus compositos cognoscamus, quorum scholasticae intentioni tribuitur nosse etiam illa, quae mandata silentio in desuetudinem abierunt, pro sui tantum temporis neogiis valitura.

Although it would be simpler and more legal to omit those constitutions that later ones have invalidated and to set forth only those that remain valid, we recognize that even this Code, and the earlier ones as well, are composed for more diligent men, to whose scholarly desire it is granted to know those things, too, which, having been consigned to silence, have passed into desuetude, having remained valid only for affairs of their own time.⁶

As a program, the ambitions of Theodosius and Valentinian for their Code are fantastically circumscribed. That is true in spite of the enormity of the editorial undertaking upon which, following this decree, Antiochus the chief compiler and his collaborators embarked.⁷ Two of the limitations specified here demand comment: first, the emperors recognized a very limited range of texts and institutions as proper sources of law – they excluded, for example, the entire body of jurisprudential literature whose excerpts fill Justinian's *Digest* – and, second, they tacitly rejected the legislative capacities of non-Christian emperors. Indeed, in their practice the editors also excluded legislation authored by Constantine prior to 313, proof, if any were needed, that he was understood in the ancient world to have converted in response to his visions and dreams before and during his Italian campaign in fall 312.⁸

In contrast, Justinian's editors aspired to include all valid, non-redundant imperial constitutions then extant, the exception to this principle being matters of religion, the focus of the first thirteen chapters of the Code's first book.⁹ For those sections the editors drew almost exclusively on legislation by Catholic emperors, the one exception being a rescript of Caracalla on the Jews of Antioch.¹⁰ If those sections bear some passing resemblance to the corresponding chapters in the Theodosian Code, the overall impression made by Justinian's compilation is rather different. In significant measure this arises from that work's very different historical self-perception. Take, for example, the chapters that each devotes *de re militari*, on 'Military affairs'. Theodosian Code 7.1 contains 18 citations, the first from Constantine and a full seven from Valentinian and Valens. The thirty-fifth section of the twelfth book of Justinian's Code likewise contains 18 citations, but they range widely, from Caracalla to Alexander Severus, Gordian, Philip, Constantine, Constans, Gratian, Valentinian, Theodosius, Arcadius, Honorius, Leo, Zeno and Anastasius. But the historical pageant on display in this chapter is not simply more true to history in some simple way, for empires, like kingdoms, can renew themselves and begin their histories afresh. Rather, it conforms more strictly to an historically dominant principle of legitimation in Roman imperial ideology, namely, its willingness, even eagerness, to record, publish, and abide by precedent.¹¹

This engagement with the long history of the empire and partial, at least, realigning of the Christian empire's practical self-awareness with that history, find expression also in the justification of Justinian's *Digest*. Justinian first announced work on that project in a constitution of 15 December 530, addressed to the officials charged with reading and editing the two thousand books of extant jurisprudential literature:

6 CTh. 1.1.5.

7 On their work see now Matthews 2000.

8 For the chronological limits of CTh. see Mommsen 1990: 1: xxix, ccix.

9 For materials prior to 438 the editors relied on 'the three ancient *codices*', the Gregorian, Hermogenian and Theodosian: *De novo codice componendo* 1; *De Iustiniano codice confirmando* 1.

10 CJ 1.9.1.

11 See Ando 2000: 30–40; Ando forthcoming: II.4, 'Conservatism and change'.

Cumque haec materia summa numinis liberalitate collecta fuerit, oportet eam pulcherrimo opere extruere et quasi proprium et sanctissimum templum iustitiae consecrare et in libros quinquaginta et certos titulos totum ius digerere, tam secundum nostri constitutionum codicis quam edicti perpetui imitationem, prout hoc vobis commodius esse patuerit, ut nihil extra memoratam consummationem possit esse derelictum, sed his quinquaginta libris totum ius antiquum, per millesimum et quadringentesimum paene annum confusum et a nobis purgatum, quasi quodam muro vallatum nihil extra se habeat.

Since this material will have been composed with the supreme indulgence of the Deity, we ought to set it out in a most handsome work, consecrating as it were a fitting and most holy temple of justice, and to distribute the whole of the law into fifty books and distinct titles, in imitation both of our Code of Constitutions and of the Perpetual Edict, in such a way as may seem convenient to you, such that nothing might be left out of the aforementioned compilation, but that in these fifty books the entire *ius antiquum*, ancient law, in a state of confusion for almost fourteen hundred years and rectified by us, might be defended, as it were, by a sort of wall and leave nothing outside itself.¹²

The recovery and recuperation of *ius antiquum*, of ancient law, for the Christian empire reflects a profound ideological and intellectual adjustment of the editorial programme designed by Theodosius and his advisors. On the one hand, it constitutes a recognition that the motivating bases of social order in late Roman society were multiple. What exactly this recuperation of classical jurisprudence and, indirectly, of classical social theory will have contributed to Byzantium, I hope in short order to clarify. At the very least, however, this invocation of the *Digest* is a reminder that Justinian's Code did not stand alone as a foundation of law in its day. On the contrary, his 'twelve books of imperial constitutions' stood alongside his 'four books of *Institutes* or *Elements* and fifty books of the *Digest* or *Pandects*' as the repository into which 'the whole legal establishment of our *res publica* has been cleansed and ordered'.¹³ How do the religious chapters of Justinian's Code appear in that larger context?

At first glance, the distinctly classical books of the *Digest* and *Institutes* appear distinctly secular. But those works are not innocent or unproblematic mirrors of the concerns of classical law. We must first of all remember that the works of Justinian's corpus were intended to complement each other: for example, nothing 'laid down in imperial constitutions' was in 'any way allowed to appear' in the *Digest*, 'a reading of the constitutions, as it were, being sufficient'.¹⁴ The secularity of the *ius civile* as it emerges in the *Digest* might therefore result not from some quality intrinsic to classical legal thought or even from the capacity of sixth-century Christian editors so to read and edit it. On the contrary, such concerns of pagan religiosity as were expressed in classical jurisprudence are likely to have been rigorously excluded, even as the principle of complementarity will have urged readers seeking laws on religion to the chronologically, religiously and doctrinally relevant chapters of the Code. The *Institutes* distinguishes itself from the Code on different grounds. In the words of its first book's first section, *De iustitia et iure*, 'On justice and law':

Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia ... Huius studii duae sunt positiones, publicum et privatum. publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem pertinet. dicendum est igitur de iure privato, quod est tripartitum: collectum est enim ex naturalibus praeceptis aut gentium out civilibus.

12 CJ 1.17.1.5 (translation after G. E. M. de Ste Croix).

13 Dig. praef. II, pr.

14 CJ 1.17.2.14.

Mastery of the law is knowledge of divine and human matters and understanding of justice and injustice ... There are two aspects to this subject, public and private. Public law is that which regards the condition of the Roman state; private law is that which relates to the well-being of individuals. We therefore speak here of private law, which has three parts: for it derives from natural precepts, from those of the nations, and those of the state.¹⁵

As the first section of Justinian's Code had concerned itself with laws urging <that no one should dare to argue about <Catholicism> publicly>, so, we are informed in the edict that authorized its publication, the Code represented the culmination of its author's efforts *ad prima communium rerum sustentationis semina*, <to provide for the maintenance of the common good>.¹⁶ However problematic the terms <public> and <common> are both individually and in their interconnections, we might nevertheless find in these passages authorization for ignoring the *Digest* and the *Institutes* in our inquiry into the relationship between religion and law in the Roman empire.

As it happens, it is precisely reading the *Digest* and *Institutes* together that forestalls any such easy dismissal of those texts. For what we then quickly learn is that Tribonian preceded the adaptation of Gaius that occupies much of Justinian's *Institutes* with an adroit paraphrase from the opening book of the *Institutes* of Ulpian. A longer, continuous portion of that work opens the first book of the *Digest*, where the following definition of *ius* is, in Ciceronian terms, enumerated:

Huius studii duae sunt positiones, publicum et privatum. publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim. publicum ius in sacris, in sacerdotibus, in magistratibus constituit. privatum ius tripartitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus.

There are two aspects to this subject, public and private. Public law is that which regards the condition of the Roman state; private, that which regards the well-being of individuals. For some matters are of public and others of private interest. Public law consists in *sacra*, priests, and magistrates. Private law has three parts: for it derives from natural precepts, from those of the nations, and those of the state.¹⁷

The continued presence of Ulpian's definition of *ius publicum*, of public law, in its programmatic position in the *Digest*, and the traces it has left in the *Institutes*, provoke several questions. We might first ask what influence it had on the shape of either work or, for that matter, on the Code. The *Institutes* are, as we have seen, avowedly concerned only with private law. The *Digest* and the *Code*, on the other hand, clearly reify in their individual arrangements the basic categories of Ulpian's definition, the former in part by what it lacks, the latter by what it contains.¹⁸

Furthermore, questions begged earlier about the sheer novelty of embracing religion within the sphere of the law, even religion in its public dimension, whatever that might be, can now be articulated and reframed. For neither the existence of laws on religious matters *per se*, nor their placement within Justinian's Code, at any rate, represented an innovation. The codifying of laws on religion does not, therefore, in itself suggest that Christian legislation on religion constituted a new form of legislation, deriving from some new understanding of the nature and scope of government. Nor, it must be said, does it require that Christian legislation alone have been included merely because Christianity was

somehow novel, such that Christian legislation against pagans and heretics was similar both in formulation and also in presuppositions to earlier pagan legislation against Christians, because, in other words, it was new, and the other was old.¹⁹

But the questions most insistently provoked by Ulpian's definition of *ius publicum* and its continued relevance are about its meaning, for Ulpian himself as for Justinian. For what its survival reveals more than anything is the continuity in language maintained by lawyers and legally-trained social theorists between the high and late empires. Though we shall have presently to explore the prior history of Ulpian's terminology, we can even now point to the difficulty that its survival sets before us. How are we to assess and describe changes in the understanding of government, law and religion, or their respective and mutually-implicated roles in the constitution of society, if the terms devised by Romans in the classical period to articulate these fundamental truths passed without remark into the linguistic toolboxes of Christian lawyers in late antiquity?

We thus seek to identify and measure a gap, a difference, the evidence for which is provided by texts compelled to elide it.²⁰ Consider, for example, the authority invoked by Justinian to support his belief that the ground on which consecrated buildings stood remains sacred even after the buildings themselves are demolished:

Sacra sunt, quae rite et per pontifices Deo consecrata sunt, veluti aedes sacrae et dona quae rite ad ministerium Dei dedicata sunt, quae etiam per nostram constitutionem alienari et obligari prohibuimus, excepta causa redemptionis captivorum. si quis vero auctoritate sua quasi sacrum sibi constituerit, sacrum non est, sed profanum. locus autem, in quo sacrae aedes aedificatae sunt, etiam diruto aedificio, adhuc sacer manet, ut et Papinianus scripsit.

Sacred things are things that have been duly consecrated to God by the *pontifices*, for example, sacred buildings and gifts duly dedicated to the service of God; by our constitution, we have forbidden these things to be alienated or charged, except for the ransoming of captives. If anyone should establish something as somehow sacred for himself, it is not sacred but profane. The ground on which sacred buildings are built remains sacred even after the building is torn down, as Papinian too wrote.²¹

Setting aside for the moment the collapsing of polarities – Christian and pagan, public and private – imminent or underway in this text, let me remark for now only that Papinian cannot, it seems to me, have meant the same thing by a <sacred building> as Justinian did.²²

15 Justinian/Tribonian *Inst.* 1.1.1, 4.

16 *De Iustiniano codice confirmando pr.*

17 Ulpian *Institutiones* bk. 1 fr. 1908 (Lenel 1889: 2: 926–927) = *Dig.* 1.1.1.2. (translation after D. N. MacCormick).

18 For the titles of the chapters in *CJ* bk. 1, see Krueger 1954: xxi. The first book of the *Digest* lacks, of course, chapters on *sacra* and *sacerdotes*, but their absence is palpable.

19 The final phrase is an allusion to Arthur Darby Nock's famous definition of conversion: Darby Nock 1933: 7.

20 See, for example, the following pieces of legislation, or references to legislation, on minority religions: Pliny, *Ep.* 10.96.3: *Neque enim dubitabam ... pertinaciam certe et inflexibilem obstinationem debere puniri*; Diocletian, *Edictum de Manichaeis* (*Mos. et Rom. leg. Collatio*), 3: *unde pertinaciam pravae mentis nequissimorum hominum punire ingens nobis studium est*; Constantine to Celsus (Appendix VII to Optatus): *... eos, quos contra fas et religionem ipsam recognovero reosque violentes competentis venerationis deprehendero, sine ulla dubitatione insaniae suae obstinationisque temerariae faciam merita exitia persolvere*; Augustine, *De anima et eius origine* (PL 44.522), 3.15.23: *Nam haec si pertinaciter singula defendantur, tot haereses facere possunt, quot opiniones esse numerantur. Quocirca considera, quam sit horrendum ut omnes sint in uno homine, quae damnabiles essent in singulis singulae*; and *NTh.* 3.8: *Hinc perspicit nostra clementia paganorum quoque et gentilis inmanitatis vigiliam nos debere sortiri, qui naturali vesania et licentia pertinaci verae religionis tramite discedentes nefarios sacrificiorum ritus et funestae superstitionis errores occultis exercere quodammodo solitudinibus dedignantur, nisi ad supernae maiestatis iniuriam et temporis nostri contemptum eorum scelera professionis genere publicentur.*

21 Justinian *Inst.* 2.1.8. Cf. Gaius *Inst.* 2.4–5: *Sacrae sunt quae diis superis consecratae sunt, religiosae quae diis Manibus relictiae sunt. Sed sacrum quidem hoc solum existimatur quod ex auctoritate populi Romani consecratum est, veluti lege de ea re lata aut senatusconsulto facto.*

22 Two recent attempts to understand the sacralization of space in pagan and Christian Rome and Byzantium are Ando 2003b: 220–243, and, in that same volume, pp. 247–251; and Ando 2001.

That one might conclude such a passage with so casual a remark, *ut et Papinianus scripsit*, demands explanation.

2 *Lex est ratio summa*

We might start by framing a set of questions, or devising second-order categories, that permit us to get past the problematic formulations that Ulpian and Justinian shared. Bracketing for the moment Ulpian's troubling *sacra* – things belonging to, or actions performed for, the gods – and concentrating instead on the civic roles of persons encapsulated in his <priests and magistrates>, we might proceed along two fronts, one anthropological, the other social-theoretic.

As regards the first, we should want to know what sort of anthropology conditioned their approaches to legislation on religion, and how that understanding was expressed in the language of the law. Consider, for example, the very different ambitions and expectations for the efficacy and reach of government action expressed by Theodosius in the fifth century of this era, and the praetor Cornelius Hyspalus in the second of the last. In the constitution of 429 that announced his desire to publish a code of law, Theodosius projected the completion of a second volume, to follow the Code itself: the Code would collect the diversity of general constitutions then permitted to be cited in court, omitting only their <empty copiousness of words>; the later volume was to omit <all that diversity of law> and take up *magisterium vitae*, <the guidance of life>, showing, in other words, *sequenda omnibus vitandaque*, <what should be pursued and what should be avoided by all>.²³ In contrast, when, more than half a millenium earlier, Cornelius Hyspalus took action against the Jews in Rome, his measures were limited to expelling them beyond the borders of the city and removing <their private altars from public spaces>.²⁴ The dramatic change in the conception of individual religious identity in its public dimension illuminated by the ambitions of these men finds a disturbing parallel in the shifting aims of judicial and public torture in the Roman empire. For where once judicial torture in classical courtrooms had aimed to elicit true statements about a self or a self's knowledge, public torture in the Christian empire aimed to alter the self, in other words, to compel conversion.²⁵ In the last words of Augustine's only sermon on Luke's disturbing admonition <to compel them to enter>: *Voluntate, inquirunt, nostra intremus. Non hoc Dominus imperavit: Coge, inquit, intrare. Foris inveniatur necessitas, nascitur intus voluntas*. <'Let us enter of our own will,' they say. That is not what the Lord commanded. 'Compel them to enter,' he said. Let compulsion be found outside, and the will shall be born within>.²⁶

23 *CTh* 1.1.5.

24 Valerius Maximus 1.3.3, in the epitome of Nepotianus: *Iudeos quoque, qui Romanis tradere sacra sua conati erant, idem Hyspalus urbe exterminavit arasque privatas e publicis locis abiecit*. On the import of this confrontation within a broader consideration of the categories Roman and alien, public and private, see Ando 2003: 193–198.

25 On judicial torture see Gleason 1999. On religious coercion see Brown 1963, and Kirwan 1989: 209–218.

26 Augustine *Serm.* 112.8. Augustine also cites and discusses Luke 14:21–23 at *contra Gaudentium* 1.25.28 and *Ep.* 185.6.24. It is perhaps worth emphasizing, as regards Cornelius Hyspalus, that I am not saying that he limited himself in acting as he did, as though he might have done more. Rather, his understanding of religious identity and religious affiliation permitted no greater action; among other things, he could not have conceived of forcing someone to convert.

At the level of social theory, we might inquire into the understanding of social order and civil society that conditioned their views of the scope and purpose of legislation. One approach lies with studying the organizational principles at work in both the Theodosian and Justinianic codifications and the use made in both works of the praetor's edict.²⁷ To the extent that such a code of private law relies upon and itself reifies a particular vision of civil society, the reliance of both late-antique codifications on the *edictum perpetuum* testifies to the unwillingness or inability of their compilers and the authors of their contents alike to imagine a whole-scale restructuring of the legal basis for social order. This is not to say, of course, that legislation on particular issues did not come to reflect some new set of <Christian priorities>,²⁸ nor do I claim that it was impossible so to reimagine the foundations of society. It is merely that government lawyers did not do so, and that fact itself had important social-historical consequences.

Another avenue to pursue in this unpacking of social-theoretic postulates might seem to lie in the language of the Codes themselves, and particularly the Justinianic one. For when Justinian distinguished between *ius civile* and *ius gentium*, he observed a distinction widely familiar to classical lawyers;²⁹ and when he then located in an ontologically and ethically prior position some <natural law>, established by divine providence, he again used language familiar from Roman political and legal theory, at least since the absorption of Cicero's books *On the Laws*.³⁰ But such similarities in terminology and networks of allusion only return us to the position whence we began. When Justinian contrasts *naturalia iura*, natural laws <observed by all races equally and established by a certain divine providence>, with <the laws that each civic community establishes for itself, which it is customary to change by tacit consent of the people or by legislation>, and Cicero, for his part, contrasts the Law, <which is highest reason, rooted in nature>, with the <laws by which states ought to be governed>, and again with <the statutes and decrees of peoples that have actually been formulated and composed>, how are we to assess them, the one against the other? We need some apparatus outside the language of the law and legal philosophy with which to evaluate the gaps each posits between divine providence or nature, on the one hand, and the enactments of particular states, on the other. And then, *within* the language of the law, how might each have understood it to say of the *ius publicum* of his own state, that it consisted in *sacra*, priests, and magistrates?

27 On the influence of the *edictum perpetuum* on bks. 2–4 of the Theodosian Code and bks. 2–7 of Justinian's Code, see Mommsen 1990: 1: xiii–xviii, or Matthews 2000: 104–108 and 117–118. For its influence on Justinian's legal projects in general see also *CJ* 1.17.1.5.

28 See, e. g., MacCormack 1997.

29 Justinian *Inst.* 1.2.1–2; Gaius *Inst.* 1.1; and cf. Cicero *Leg.* 1.17. For a recent survey see Kaser 1993: 10–22, 40–59.

30 See Justinian *Inst.* 1.2.11 (*Sed naturalia quidem iura, quae apud omnes gentes peraeque servantur, divina quadam providentia constituta, semper firma atque immutabilia permanent: ea vero quae ipsa sibi quaeque civitas constituit, saepe mutari solent vel tacito consensu populi vel alia postea lege lata*), to which compare Cicero *Leg.* 1.17–18 (*Natura enim iuris explicanda nobis est, eaque ab hominis repetenda natura, considerandae leges quibus ciuitates regi debeant; turn haec tractanda, quae composita sunt et descripta iura et iussa populorum, in quibus ne nostri quidem populi latebunt quae uocantur iura ciuilia ... Igitur doctissimis uiris proficisci placuit a lege, haud scio an recte, si modo, ut idem definiunt, lex est ratio summa, insita in natura, quae iubet ea quae faciendae sunt, prohibetque contraria. Eadem ratio, cum est in hominis mente confirmata et perfecta, lex est*), 2.10 and 13; and Gaius *Inst.* 1.1. On so-called <reason> and natural law, see Moatti 1997: 163–173, and Dyck 2003: ad loc. Some of these passages are discussed further below.

3 *Ius publicum*: an archaeology

The debates to which Ulpian was party, and those that he influenced, both rested on and contributed to on-going negotiations over the relationship between civic law, religion and social order. Those negotiations were themselves implicated in cultural-historical changes of the most fundamental and far-reaching kind. To sketch their parameters we might begin by inquiring into *ius publicum* itself. That effort immediately reveals three things. First, for that phrase English, at any rate, has no equivalent: neither 'constitution', which has a common meaning, nor 'public law', which does not, will do.³¹ Second, Rome had no constitution, of whatever description – that is to say, we know of no authorized or circumscribed body of law, statutory, jurisprudential, or otherwise, that comprised the *ius publicum*. Third, despite the easy economy of Ulpian's apparently ostensive definition, *ius publicum* as a concept itself appears to have a foreshortened history. The authority of the jurist appears, on first examination, chimerical.

Which is not to say that republican and early imperial Rome did not have bodies of law, but that their internal heterogeneity and divergence as a group from the Codes of the high empire alike require analysis. The Twelve Tables, for example, the erstwhile antecedents for the Codes, dealt, so far as I can tell, exclusively with civil and criminal law and procedure; they contained nothing relevant to 'sacra, priests and magistrates'.³² Indeed, the surviving text that most clearly aspires to provide a statement of a Roman community's *ius publicum* deals not with Rome itself, but the municipalities of Spain, the so-called *lex Flavia municipalis*. As its name implies, this text might accurately be described not only as a 'constitution' or 'charter', but a 'statute' or 'law', for it seems to have been the product of comitial law-making, as would have been its Augustan and Julian antecedents, such as they were, if they existed.³³ The structure of that law clearly anticipates Ulpian's schema: on any reasonable reconstruction, it opened with chapters treating *sacra* and priesthoods, before turning to magistrates, the subject of the first extant chapter, the nineteenth of ninety-seven.³⁴ And insofar as the Flavian municipal law was written at Rome, it implicitly raises the question when and why *ius publicum* began there so to be conceived, not least in light of the Romans' persistent unwillingness or, perhaps, lack of interest in codifying their own.

To answer this question properly, we should want to pose it on at least three levels: lexical, cultural-, and intellectual-historical. As regards the first, we might ask whether the indeterminacy of *ius publicum* corresponds in any way to the history of *ius*. If *ius* could designate a body of law, what did it mean to say of an action that it was not *ius*? A cultural historian should inquire into the history of bodies of law and ask how their history

intertwines with that of theorizing law itself. What forces conspired to produce particular understandings of the purpose and sources of law? Finally, as a matter of the history of ideas, we might ask how the particular anthropological and theological postulates of any given culture found expression in its views on law and, in this case, in their codifications of law.

Although I concentrate in this paper on the last of these questions, I should acknowledge that none can be fully answered in isolation from the others. So, for example, Cicero occasionally distinguished between *ius religionis* and *ius rei publicae*, between a 'law of religion' and a 'law of the state', the latter of which he glossed as *ius publicum*, which last phrase he then defined by apposition as 'the *leges*, the statutes used by this community of citizens'.³⁵ Thus described, the *ius rei publicae* and *ius publicum* bear a striking resemblance to the *ius civile* as defined by Cicero in *Topica*, in an exercise in enumeration: 'so, for example, one might define *ius civile* as made up of statutes, decrees of the Senate, judicial decisions, the authority of those learned in the law, the edicts of magistrates, custom, and equity'.³⁶

This lack of specificity or, better yet, this fluidity in the usage of *ius* is illustrative of two trends, both relevant here. On the one hand, it attests the cachet of law itself, and in particular of law as a system of knowledge or body of doctrine. The rise in the century before Cicero of a body of experts and corpus of texts on what Ulpian would later call *ius publicum* in itself testifies to broad-based and mutually implicated changes in attitudes to constitutional law and knowledge-production.³⁷ Although these changes can be measured across the full span of contemporary intellectual activity,³⁸ and not least in theology and cultural geography,³⁹ what must be stressed here is the enormous range of disciplines whose erudition and ways of knowing were subordinated in the age of Cicero to the notion of *ius* and, crucially, among them were the regulations, principles and bodies of knowledge that we follow Cicero and his contemporaries in denominating the *iura* of the *pontifices*, the augurs, and the fetials. Cicero himself remarked upon this sea-change when in the second book of his treatise *On the Laws* he invoked the Scaevolae, jurists and *pontifices* of the previous two generations, and asked why they wished to associate pontifical and civil law. 'Through knowledge of the civil law, in fact you destroy in a sense pontifical law. For religious obligations are connected to money by the authority of the *pontifices*, not by statute. So, if you were only *pontifices*, pontifical authority would survive; but because you are most learned in civil law, you make a mockery of the one branch of learning through the other'.⁴⁰

Two features of Cicero's analysis merit attention now, before returning to the twin developments in classical theorizing about the law and bodies of law mentioned above. First, as a matter of historiography, the epistemic revolution that we have described in the abstract, Cicero as a classical intellectual conceived in biographical terms; and the agency behind broad-based cultural change he thus located in the aspirations and actions of two

31 On this topic see Cloud 1994: 491–499. For an analysis focused not on the reception of classical law but on historiography about it see Thomas 1984.

32 For a text of the extant fragments, see now M. Humbert, A. D. E. Lewis and M. H. Crawford 1996: no. 40 = 2: 555–721. This seems to me an accurate characterization of the fragments, in spite of several ancient *testimonia* that suggest a much wider range of concerns for the Tables, the most explicit of which is Livy 3.34.6: 'even now, amidst an immense accumulation of statutes piled on statutes, the (original Ten) Tables are the *fons omnis publici privatique ... iuris*'. Others, including Pomponius, regarded the Tables more narrowly as the source 'whence the *ius civile* began to flow' (*Dig.* 1.2.2.6). On the secular character of the Tables see Magedelain 1986, one of many studies that subjects the rather fragile evidence for the content of the Tables to linguistic-historical analysis: 'Dans la Rome archaïque, le droit est un langage ...' (296), with, it must be said, some considerable philological naïvete.

33 The *lex* is most easily read in González 1986.

34 On the contents of the first eighteen chapters see Galsterer 1988: 79–82.

35 Cicero *Dom.* 32–33. See also Cicero *Har. resp.* 14–15: *Multae sunt domus in hac urbe, patres conscripti, atque haud scio an paene cunctae iure optimo, sed tamen iure privato, iure hereditario, iure auctoritatis, iure mancipi, iure nexi: nego esse ullam domum aliam privato eodem quo quae optima lege, publico vero omni praecipuo et humano et divino iure munitam; quae primum aedificatur ex auctoritate senatus pecunia publica, deinde contra vim nefariam huius gladiatoris tot senati consultis munita atque saepta est.*

36 Cicero *Topica* 28.

37 On law, see Moatti 1991.

38 See Moatti 1997.

39 On these see Beard 1986, and Nicolet 1991.

40 Cicero *Leg.* 2.52 (translation after James E. G. Zetzel).

named individuals.⁴¹ Second, as a matter of history, Cicero gestured toward one essential feature of relations between law and religion in classical Rome, namely, that where once the language of statutes had been deeply indebted to that of religion, the late Republic witnessed a profound reinscription of priestly knowledge and authority within and under the overall authority of the Senate, which was itself then coming to be understood as an institution or apparatus of the state.⁴²

This returns us to the second movement attested by the fluidity of *ius* in the age of Cicero. Situating this discourse about law properly in its historical context requires the asking of at least two questions, namely, what made it necessary, and what made it possible. In replying to the first, we might point to the dramatic expansion of the Roman state over the long century between 167 and 51, namely, between the decision *not* to annex the kingdom of Perseus of Macedon and the writing of Cicero's books *On the laws*. Rome expanded over that span in two very different ways, in the sheer amount of territory embraced by its empire (perhaps quadrupling), and in the size and geographic spread of its citizen body (more than tripling in number). The range of peoples, language groups and legal systems thus united will have been enormous, and the demands thereby placed upon Roman officials, operating within an ancient technological regime, staggering.⁴³ The Romans responded in practice largely by adapting mechanisms for negotiating across cultural and legal systems that they had developed or told themselves they had developed during the unification of Latium in the late fourth century. But the violence of the adaptation required in this period produced on the one hand a sundering of old assumptions about patriotism, language, and ethnic affiliation and their interconnections,⁴⁴ and on the other tremendous pressure to theorize anew the nature and variety of human communities, how they arise, how they cohere, and how they relate to one another.⁴⁵

This brings us to the second question framed above, namely, what made it possible for late Republican theorizing about human communities to assume the form it did. If the answer loosely must be the absorption across this same century of a Greek passion for abstraction, a more precise one would focus on the reception of Peripatetic cultural historiography.⁴⁶ At the same time, at a theoretical level, the influence on the human sciences of an Aristotelian preference for elaborating theoretical constructs on the basis of empirical observation ultimately proved decisive. But despite the impulse provided by these currents, the theorizing of religion, law and society then performed at Rome assumed very particular and idiosyncratically Roman forms. Take, for example, one of Cicero's many attempts to describe the forms and bases of human communities, that in the first book of *On duties*:

Gradus autem plures sunt societatis hominum. Ut enim ab illa infinita discedatur, proprius est eiusdem gentis nationis linguae, qua maxime homines coniunguntur. Interius etiam est eiusdem esse civitatis; multa enim sunt civibus inter se communia, forum fana porticus viae leges iura iudicia suffragia, consuetudines praeterea et familiaritates multisque cum multis res rationesque contractae. Artior vero conligatio est societatis propinquorum; ab illa enim immensa societate humani generis in exiguum angustumque concluditur.

41 Cf. J. G. A. Pocock's remarkable essay: Pocock 1996: 3–7.

42 On the language of the law, see Thomas 1988. On priesthood, see Beard 1990; Gordon 1990; and Rüpke 2005. Gordon's paper has been reprinted in Ando 2003, 62–83.

43 The most comprehensive history of this century remains Nicolet 1979; the most exciting analysis of nature of government in the mid-first century B. C. the same author's *Financial documents and geographical knowledge in the Roman world* (Nicolet 1996).

44 On this topic see Thomas 1996.

45 For some reflections on this topic see Ando 2002.

46 On the arrival of Aristotle at Rome see Barnes 1997.

There are indeed several *gradus* of *societas*, degrees of fellowship among humans. To proceed from the one that is unlimited, next there is a closer one of the same race, tribe and language, through which humans are bound strongly to one another. More intimate still is that of common citizenship; for many are the things held in common by citizens between themselves: the forum, temples, porticoes, and roads; statutes and legal rights; legal judgments and political elections; and, besides these, acquaintances and companionships and those business and commercial transactions that many of them make with many others. A tie narrower still is that of the fellowship between relatives: moving up from the vast fellowship of the human race we end up in a confined and limited one.⁴⁷

Cicero's recourse here to the term *societas* betrays a distinct reliance, however analogical, on the Roman law of corporations, not simply for understanding the consensual and normative basis of *civitates*, communities of citizens, but for representing interpersonal relations in general; likewise Roman is his insistence on enumerating the *res communes*, both legal and abstract, and material and concrete, of communities of citizens, and the vocabulary he uses for them is stringently Latin.⁴⁸

Within a specifically legal discursive tradition, this theorizing resulted in the drawing of two closely related distinctions, between natural law and civil law, on the one hand, and between the various civil law traditions of individual states, on the other. As regards the first, in Cicero's formulation, that *ius*, that Law, is unitary, by which the fellowship of humans is made fast, and it was established by a single *lex*, a single statute, which statute is correct reasoning in commanding and prohibiting.⁴⁹ Therefore, just as that *divina mens*, that divine mind is the *summa lex*, the highest statute, so, when it is brought to perfection in humans, (it resides) in the minds of the wise. The legislation that has been written down for nations in different ways and for particular occasions has the name of statute more as a matter of courtesy than of fact.⁵⁰ Cicero's interest in discussing this Law, this 'highest statute', lay with assessing against it the 'institutions and statutes of nations',⁵¹ and so in the theoretical sections of the first two books of *On the laws* he argued principally about the ethical status of individual statutes, and he generally dealt in hypotheticals:

Quodsi populorum iussis, si principum decretis, si sentiis iudicum iura constituerentur, ius esset latrocinari, ius adulterare, ius testamenta falsa supponere, si haec suffragiis aut scitis multitudinis probarentur.

If instantiations of this Law were really established through the decrees of nations or commands of kings or decisions of judges, then it would be lawful to commit brigandage or adultery or to suborn false testimony, so long as these things were approved by votes or decrees of the multitude.⁵²

Quid quod multa perniciose, multa pestifere sciscuntur in populis, quae non magis legis nomen adtingunt, quam si latrones aliqua consensu suo sanxerint? Nam neque medicorum praecepta dici vere possunt, si quae inscii inperitque pro salutaribus mortifera conscripserint, neque in populo lex, cuiusmodi fuerit illa, etiam si perniciosum aliquod populus acceperit. Ergo est lex iustorum iniustorumque distinctio, ad illam antiquissimam et rerum omnium principem expressa naturam, ad quam leges hominum diriguntur, quae supplicio improbos adficiunt, defendunt ac tumentur bonos.

47 Cicero *Off.* 1.53 (translation after E. M. Atkins).

48 On this passage see Remy 1930; on the cross-pollination between legal and philosophical treatments of *societates* see Moatti 2001: 825–827. On the Romanness of late Republican political theory, see Ando 1999: 9–18, and cf. Ando 2003c.

49 Cicero *Leg.* 1.42: *est enim unum ius, quo devincta est hominum societas, et quod lex constituit una; quae lex est recta ratio imperandi atque prohibendi ...*

50 Cicero *Leg.* 2.11 (translation after James E. G. Zetzel).

51 Cicero *Leg.* 1.42.

52 Cicero *Leg.* 1.43.

What of the fact that many things are approved by peoples that are damaging and destructive, which no more approach the name of law than whatever bandits have agreed upon among themselves? The instructions of doctors cannot truly be so called if in ignorance and inexperience they prescribe poisons in place of medicine; nor, even if the people approve it, will something harmful in a nation be a law of any kind. Law, therefore, is the distinction between just and unjust things, produced in accordance with nature, the most ancient and first of all things, in accordance with which human laws are constructed that punish the wicked while defending and protecting the good.⁵³

Despite Cicero's particular interest in the normative ethical status of laws of individual states, his reasoning might seem to permit the construal of *ius civile*, of civil law, as the product of historical and contingent human institution-building; and thus it would seem to permit the assigning of like ontological status to all civil law traditions.

And that, at the level of theory, is precisely what subsequent jurists then maintained. So, for example, the sentence that now opens Gaius' *Institutes* asserts that 'the *ius* that each people establishes for itself is peculiar to it and is called the *ius civile*, as being the law peculiar to that community of citizens; while the law that *naturalis ratio*, natural reason has established among all humans is observed by all peoples equally and is called the law of nations, as being the law used by all nations'.⁵⁴ When Gaius then came to trace the development of Roman law in his books on the Twelve Tables, he thus insisted that its history began *ab urbis initiiis*, with the foundation of the city.⁵⁵ Similarly, although Gaius' contemporary Pomponius opened his *Handbook* with the allowance that 'it [was] necessary [for him] to go over the origin and development of *ipsius iuris*, of law itself', in point of fact his story opens *initio civitatis nostrae*, 'at the beginning of our community of citizens' and traces its passage from an archaic condition without statutes or fixed legal rights through its growth to a condition wherein statute law was necessary.⁵⁶

For his part, Justinian started the second chapter of the first book of his *Institutes* by quoting the opening of Gaius' work of that name, but upon Gaius' terse formulation he then offered a considerable elaboration:

A particular *ius civile* is named after an individual state, for example, the Athenians: for if someone wished to call the laws of Solon or Draco the *ius civile* of the Athenians, he would not err. So, too, we name the *ius civile* of the Romans that *ius* that the Roman populace uses, or the *ius Quiritium* that *ius* that the Quirites use, for the Romans are called Quirites from Quirinus. But when we add no word signifying the state whose law we discuss, we speak of our own *ius*; just as when we say 'the poet' and add no name, among Greeks it is assumed that the excellent Homer is being named, but among us, Vergil.⁵⁷

Justinian returned from this digression to a discussion of the sources of law and the forms of Roman legal enactments, before closing the chapter by revisiting the problem of natural law, in a passage that alludes to both Cicero and Gaius:

Sed naturalia quidem iura, quae apud omnes gentes peraeque servantur, divina quadam providentia constituta, semper firma atque immutabilia permanent: ea vero quae ipsa sibi quaeque civitas constituit, saepe mutari solent vel tacito consensu populi vel alia postea lege lata.

53 Cicero *Leg.* 2.13 (translation James E. G. Zetzel); cf. Cicero *Rep.* 1.39.1, on which see Macrobius *Somn.* 1.8.13.

54 Gaius *Inst.* 1.1; translation after de Zulueta 1946, whose notes merit consultation throughout.

55 Gaius *Ad legem duodecim tabularum* bk. 1 fr. 418 (Lenel 1889, 1: 242) = *Dig.* 1.2.1.

56 Pomponius *Enchiridion* fr. 178 (Lenel 1889, 2: 44–45) = *Dig.* 1.2.2. *pr.*–3.

57 Justinian *Inst.* 1.2.2.

But natural laws, which are observed uniformly among all peoples, are established by a certain divine providence, and abide fixed and immutable; the laws that each community establishes for itself, on the other hand, are accustomed to be changed often, either by the tacit consent of the people or by the passage of a new statute.⁵⁸

On this evidence, the Christian emperor seems to share with his classical forbears a sense that civil law traditions each potentially participate in, as well as depart from, some superior Law or laws, while figuring each of them as the product of historical actions on the part of their authoring communities.⁵⁹ Here, at least, Justinian evinces an openness of mind, a classical relativism, that substantially tempers the normative claims implicitly advanced in the act of sovereign law-giving.

Cicero had, of course, advanced two different claims, of two different kinds, about the nature of law at the opening of the second book of *On the laws*. One, as we have seen, was metaphysical; it located the origin of law in nature, 'the most ancient and first of all things'. The second was descriptive; 'law', he wrote, 'is the distinction between just and unjust things'. This latter claim had a reception, too, one connected to the reception of the first by the etymological association of *ius*, 'law', with *iustitia*, 'justice'. Roman lawyers and philosophers after Cicero followed him in exploiting and exploring through plays on words the potential divergence between law-as-contingent-legal-enactment and law-as-reification-of-a-transcendent-virtue. Ulpian, for one, did so at the very start of his *Institutes*:

Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. est autem a iustitia appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi. Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profiteamur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes.

A law student at the outset of his studies ought first to know the derivation of the word *ius*. Its derivation is from *iustitia*. For, in terms of Celsus' elegant definition, *ius* is the art of goodness and fairness. Of that art we [jurists] are deserved called the *sacerdotes*, the priests; for we cultivate *iustitia*, justice, and claim awareness of what is good and fair, discriminating between fair and unfair, distinguishing lawful from unlawful, aiming to make people good not only through fear of penalties but also indeed under allurements of rewards, and espousing a philosophy that, if I am not deceived, is genuine, not a sham.⁶⁰

Ulpian's slightly younger contemporary Paul connected Cicero's two claims in a digression on the meanings of *ius* in the fourteenth book of his work *Ad Sabinum*:

Ius pluribus modis dicitur: uno modo, cum id quod semper aequum ac bonum est ius dicitur, ut est ius naturale. altero modo, quod omnibus aut pluribus in quaque civitate utile est, ut est ius civile.

The term *ius* is used in several senses: in one sense, when it is used as meaning what is always fair and good, it is *ius naturale*, natural law. In the other, as meaning what is in the interest of everyone or a majority in each *civitas*, each community of citizens, it is *ius civile*, civil law.⁶¹

58 Justinian *Inst.* 1.2.11.

59 It is in this context important to observe that the passages of Gaius and Pomponius treating the origins of (Roman) law open the chapter of the *Digest* entitled *De origine iuris et omnium magistratuum et successione prudentium*, 'On the origin of law and of all the magistracies and the succession of the jurists.'

60 Ulpian *Institutes* bk. 1 fr. 1908 (Lenel 1889, 2: 926–927) = *Dig.* 1.1.1. *pr.*–1 (translation after D. N. MacCormick).

61 Paul *Ad Sabinum* bk. 14 fr. 1864 (Lenel 1889, 1: 1287) = *Dig.* 1.1.11 (translation D. N. MacCormick).

When, three hundred years later, Justinian published his *Institutes*, he followed Ulpian in offering a definition of *ius* at the outset in a chapter entitled *De iustitia et iure*, 'On justice and law', before turning to the different forms or meanings of *ius* in chapter two, *De iure naturali et gentium et civili*, 'On natural law, the law of nations, and civil law'.

Iustitia est constans et perpetua voluntas ius suum cuique tribuens. Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.

Justice is the constant and unending desire to render to each his due. Learning in the law entails knowledge of divine and human matters and mastery of the just and unjust.⁶²

The last clause clearly invokes Cicero's description of law as *iustorum iniustorumque distinctio*, as 'the distinction between just and unjust things'. Whence derived Justinian's interest in 'divine and human matters', and what did it mean to say of them both that, like the law, they were knowable?

4 Law among human and divine matters

Our first impulse might be to recall Ulpian's 'sacra, priests and magistrates', and then to despair that, once again, the Christian emperor's classicizing language has left us ill-positioned to isolate and assess the distance legal theory traveled between the first, third and sixth centuries. But Justinian's allusion is far more precise, and its unraveling offers, I believe, the heuristic device we have so far lacked. For he gestures, I would argue, not to Ulpian nor, for that matter, to a jurist at all, but to Cicero's contemporary Varro, Rome's greatest cultural historian, and specifically to that author's *Antiquitates rerum humanarum et divinarum*, 'The antiquities of human and divine matters'. Varro's interest was not the law, of course; but he shared with Cicero a passion to articulate and respect the knowledge-interests and historical postulates of what we might call a classical Roman anthropology. In Varro's work, together with Augustine's reaction to it, we have, I shall argue, a Christian reading of classical thought that parallels Justinian's use of Cicero and the jurists, but which voices its concerns in an entirely different language precisely the apparatus we sought at the end of Section 2.⁶³

According to Augustine, 'Varro wrote 41 books of *Antiquities*, which he divided into human and divine affairs; to human affairs he apportioned twenty-five books, and to divine sixteen.'⁶⁴ The positioning of divine affairs after human ones was deliberate and, indeed, Varro himself both remarked upon and justified it.

Varro himself admits that he wrote about human affairs first, and then about divine affairs, because civil societies arose first and subsequently the things established by them. 'Just as a painter is prior to his painting, or a builder is prior to a building, so communities of citizens are prior to the things that are instituted by them.'⁶⁵

In his reading of the *Antiquities*, Augustine poured the full force of his ire into a denunciation of what seems, on his reading, to have been Varro's central presupposition, namely, the chronological priority of human communities over the practices and institutions established by them. But Augustine ultimately disputed more than the claim of chronological priority advanced by Varro on behalf of civil societies and, in doing so, he

argued past and ultimately distorted him. For Augustine advanced his critique on the basis of a metaphysical postulate that was, for him, axiomatic: namely, that God is both ontologically and chronologically prior to humans, and hence things established by God, or by humans on the basis of his Scripture, themselves have a claim to priority over the institutions of earthly cities. Moreover, precisely because Augustine regarded that claim as axiomatic, his response to Varro's defense of the structure of the *Antiquities* makes no attempt at sympathetic understanding, nor even at articulating of Varro's own presuppositions and the differences that lay between them:

But the true *religio* was not established by any terrestrial society; on the contrary, it was the true religion that established heavenly society. This in truth is revealed and taught by the true god, the giver of eternal life, to his true worshippers.⁶⁶

Within this argument, we can identify three crucial points of contention between Augustine and Varro, each in some way the product of the postulate described above. First, Augustine is concerned that *religio* be true; second, he posits religion as prior to both heavenly and earthly societies, of which the former was in fact 'established' by religion; and third, some, or perhaps *the*, truth about these matters is communicated directly and unproblematically from Augustine's God to his worshippers.

There is a constant danger in reading Varro through Augustine – and there is, alas, no other way to do so – that the force and skill of Augustine's polemic will cause us to misrecognize the very different position whence Varro began. Sharing a notion of 'religion' more in keeping with Augustine's *religio* than Varro's *res divinae*, modern readers have not unpacked the import of Varro's own description of his project.⁶⁷ That description is, alas, available to us only through Augustine's condescending attempt to co-opt Varro's critique of civic religion for his own purposes.

Does Varro not acknowledge that he does not of his own judgment uphold the things that he records the Roman *civitas* as having instituted? Does he hesitate to affirm that if he had been founding a new city, he would have given the gods and their names rather according by the rule of nature?⁶⁸

Indeed, Varro allowed that had he been writing *de omni natura deorum et hominum*, 'about all the nature of the gods and humans', he would have written about divine matters first, and then about human matters. But as it was, 'he wrote his books about human affairs not with respect to the entire world, but with respect to Rome alone'.⁶⁹

Varro clearly did not assign either chronological or ontological priority to humans over gods. Far from it. He departed from Augustine elsewhere. Crucially, Varro's gods (Roman gods) did not communicate directly with their worshippers. This is not to say that they were not present to the Romans in some fashion; on the contrary, the gods of Rome were residents and citizens of the city itself.⁷⁰ They were, moreover, held to communicate all the time, but with enormous indirection, so much so, that from a Roman perspective, the structure and complexity of the apparatus of state cult resulted precisely from the need to record and adjudge such information as the gods provided.⁷¹ But the sort of expertise produced by the recording of hundreds of takings of auspices, for example, even together with a record of the success or failure of the action that followed, was at best not a knowing what to believe, but a knowing what to do.⁷² The chronological priority of Varro's gods or,

66 Augustine *Civ.* 6.4.

67 On *religio* and religion, see Ando 2003: 2–3 and the literature cited there.

68 Augustine *Civ.* 4.31 = Varro *Ant. Div.* fr. 12 Cardauns; cf. Augustine *Civ.* 6.4.

69 Augustine *Civ.* 6.4 = Varro *Ant. Div.* fr. 5 Cardauns.

70 Scheid 1985; Scheid 1987/89; Scheid 1985: 69–76.

71 Ando 2003a.

72 Linder and Scheid 1993: 49–50; Ando 2003: 11; Gordon 2003: 77–78.

62 Justinian *Inst.* 1.1. pr.–1 (translation after Peter Birks and Grant McLeod).

63 For an attempt to read Varro and Augustine along similar lines but concentrating on epistemic concerns, see Ando 2003a, in Ando 2003: 13–15.

64 Augustine *Civ.* 6.3 = Varro *Ant. Div.* fr. 4 Cardauns.

65 Augustine *Civ.* 6.4 = Varro *Ant. Div.* fr. 5 Cardauns.

perhaps, his belief in their priority did not, therefore, produce for them a privileged role in his conception of the rise of human institutions. And institutions, that is, the institutions of religious worship, were Varro's topic, not the nature of the gods *per se*. This sundering of historical agency from the gods was thus the product of an epistemic position fundamentally different from Augustine's, visible not least in Varro's claims on behalf of theology: *theologia* was for him a *ratio*, *quae de diis explicatur*, a discursive system for explaining things about the gods. The various forms of theology were, in other words, merely branches of human wisdom, employed to elucidate something altogether ontologically distinct from themselves.⁷³

Varro himself chose to write in the latter books of his *Antiquities* a theology of practice. Having divorced *res divinae* from any metaphysical claim that one might make on behalf of the gods, Varro could then argue that institutions of worship should not be differentiated from any other institution established by humans. Like Cicero's laws, Roman ways of worshipping the gods existed in such a world view alongside many parallel ways of worshipping gods, and there were no a priori reasons for privileging any one set of ways over the others.

On the chronology advanced here, the easy simplicity of Ulpian's language reflects hard-won confidence. Indeed, the very lack of specificity in the notion of *ius publicum* in the late Republic reflects the tentative nature of the project on which Cicero and Varro were engaged. Roman magistrates and priests had, of course, long cooperated in the performance of rituals and the management of sacred properties, much as Roman legal writing and legal practice had always already been implicated in the language of sanctions and oaths. But Roman political action ultimately and, to a degree, inadvertently brought massive historical pressures to bear upon the theoretical constructs that had ordered social and religious life in the mid-Republic. Historiography to one side, it became necessary to explain the situation of Rome in the world, and the systems of abstraction developed in the course of that undertaking found expression in cultural and legal theory in the promotion of *ius* and relativizing of *sacra*.

5 Classical social theory and Christian metaphysics

In the chapter that Justinian devoted to *rerum divisio*, 'the classification of things', he considered briefly how things come to be the property of private individuals. This happens in many ways, he wrote.

[*Singulorum autem hominum multis modis res fiunt:*] *quarundam enim rerum dominium nanciscimur iure naturali, quod, sicut diximus, appellatur ius gentium, quarundam iure civili. commodius est itaque a vetustiore iure incipere. palam est autem, vetustius esse naturale ius, quod cum ipso genere humano rerum natura prodidit: civilia enim iura tunc coeperunt esse, cum et civitates condi et magistratus creari et leges scribi coeperunt.*

Ownership of some things arises from natural law, which, as we have said, is also called the law of nations; ownership of other things arises from *ius civile*. It is easier to begin from the older law. For it is clear that natural law is older, as nature produced it at the same time as the human race; but civil law traditions came into existence only when communities of citizens began to be established, and magistrates created and statutes passed.⁷⁴

As it happens, Justinian borrowed extensive portions of this material from the second book of Gaius' work *Quotidian or Golden Things*:

Quarundam rerum dominium nanciscimur iure gentium, quod ratione naturali inter omnes homines peraeque servatur, quarundam iure civili, id est iure proprio civitatis nostrae. et quia antiquius ius gentium cum ipso genere humano proditum est, opus est, ut de hoc prius referendum sit.

Ownership of some things arises from the law of nations, which is observed in accordance with natural reason among all humans equally; ownership of other things arises from civil law, that is, from the law that is specific to our *civitas*. And since the older law of nations was produced together with the human race itself, it is necessary, to treat of it first.⁷⁵

Justinian's brief remarks notably expand upon the cultural and historical ambitions of his exemplar, which is not to say that he wrote anything with which Gaius would have disagreed. But his slight alterations, the explicit recognition accorded other civil law traditions, the emphatic association of civil law with communities of citizens passing laws upon themselves, reflect an ecumenism and historical vision that are as humane as they are classical.

It is not that Justinian's view of the human past was necessarily incompatible with a Christian one. In the early chapter that he devoted to 'The law of nature, the law of nations, and civil law', whence I quoted his digression on the civil law traditions specific to Athens and Rome, Justinian observed that 'the law of nations', by contrast, 'is common to the entire human race'.

[*Ius autem gentium omni humano generi commune est.*] *nam usu exigente et humanis necessitatibus gentes humanae quaedam sibi constituerunt: bella etenim orta sunt et captivitates secutae et servitutes, quae sunt iuri naturali contrariae; iure enim naturali ab initio omnes homines liberi nascebantur.*

For pressing need and human necessities led such human peoples as there were to establish the law of nations for themselves. For wars arose and captives were taken, and slaves, whose condition is contrary to natural law, for by natural law all humans were initially born free.⁷⁶

Justinian's view of warfare here finds a close kin in two famous chapters on warfare in the nineteenth book of Augustine's *City of God*. Augustine dedicated that book to an inquiry into happiness, and asked how or whether it might be found in earthly society. Having shown, as he imagined, the deplorable position of the judge within communities of citizens, compelled by *humana societas*, by human fellowship, to torture innocent people and render judgments in ignorance, Augustine moved on to the world.

After the *civitas* or city follows the world, in which they place the *tertium gradum ... societatis humanae*, the third degree of human fellowship, starting from the household and then the city, and coming by progression to the world ...⁷⁷

In that larger arena of human contact, Augustine maintained, people must first overcome language difference just to make each other's acquaintance, and even then, having made friends, they must worry 'lest [their friends] be afflicted by hunger, by war, by sickness, by captivity, lest they suffer in slavery such things as we are not strong enough to imagine ...'. Augustine then mourned two failings of friendships, that friends often cease to be friends, and that friends die. He who would avoid the sadness brought by the deaths of friends 'must shun, if he can, friendly conversation, must forbid or destroy friendly affection, must disrupt with the ruthless violence of his mind *humanarum omnium necessitudinum vincula*, the bonds of all human relationships.'⁷⁸

75 Gaius *Rerum cottidianarum* bk. 2 fr. 491 (Lenel 1889: 1:251) = *Dig.* 41.1.1. *pr.*

76 Justinian *Inst.* 1.2.2.

77 Augustine *Civ.* 19.7.

78 Augustine *Civ.* 19.8.

73 Varro *Ant. Div. fir.* 7–11 Cardauns.

74 Justinian *Inst.* 2.1.11.

The lexical coincidence between these passages to one side, following immediately upon the abstraction *usu*, need, Justinian is likely to have intended *necessitates* as an abstraction, too; while Augustine clearly refers to human relationships, Augustine's terminology is in many respects no less classical than Justinian's. But as with his rejection of Varro's anthropology, here Augustine alluded to Cicero only to upend his classical, Roman privileging of the *civitas*, the community of citizens. For Cicero did far more than devote the most space to the *gradus* of the *civitas* in his remarks on human fellowship in the first book of *On duties*. The authoring of *On the laws* in itself testifies to the valuation he accorded the *civitas* as the supreme arena for the exercise of human virtue, to say nothing of the argument of *On the Republic*. We need only recall from those books his most remarkable and enduring achievement, namely, his contention that the bonds that united and sustained *civitates* were those that citizens made for themselves, namely, their laws.⁷⁹ Augustine's rejection, however sorrowful, could not be more stark. Not only did he dismiss the *civitas* as an arena for the pursuit of happiness first, rather than last, among the degrees of fellowship, he had done so on the grounds that not even a wise man could enforce its laws without guilt.

Augustine had the luxury of writing as an outsider, though he, too, tended a human community, or two of them, his church and his monastery. Theodosius, on the other hand, resembled Justinian in having the pragmatic concerns of an administrator. But his attempt to produce a Christian code, of law by citing only laws written by Christian emperors, failed to advance an explanation for how and why communities arise and cohere, and so failed to justify the place of law, even Christian law, within conceptions and systems of social order. The precariousness of its hold on the imagination of kings and scholars resulted directly from that fact.

The remarkable influence of Justinian's Corpus may thus be attributed in part to its recuperation of classical political and legal theory, and in this respect it stands alongside a much wider and more complicated revival of classical learning and classical beliefs in sixth-century Byzantium.⁸⁰ The sheer ambition of his project nevertheless merits still further reflection, for Justinian and his collaborators embarked on it not in order to return classical law to a West that had lost it, but to revive it for Christian Constantinople. Read with that fact in mind, Justinian's justification for producing the *Digest* shocks and amazes:

Whereas, then, nothing in any sphere is found so worthy of study as the authority of law, which sets in good order both divine and human affairs and casts out all iniquity (*quae et divinas et humanas res bene disponit et omnem iniquitatem expellit*), yet we have found the whole stream of our laws, which has come down from the foundation of the city of Rome and the days of Romulus, to be so confused that it extends to an inordinate length and is beyond the comprehension of any human nature.⁸¹

We might have expected Justinian to acknowledge some other rank-ordering between law and *res divinas*, or to recognize the strands within Christianity that claimed to transcend the contingent political boundaries of empires, or even to look beyond the foundation of Rome to those prior ages whose history functioned, for Augustine, at least, to diminish the historical and metaphysical claims of the city of Romulus.⁸² What we find instead is, once again, a polite reversal of Varro's categories and the modest claim, quoted from Salvius

79 Cicero *Rep.* 1.39.1: *Est igitur, inquit Africanus, res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus.*

80 Cf. Ando 2001.

81 *CJ* 1.17.1.1 (translation after G. E. M. de Ste Croix).

82 Ando 2001: 383–405.

Julianus, <that other *civitates* ought to follow the *consuetudo* of Rome, and not Rome those of other *civitates*>.⁸³

There is one place in his theorizing on law where Justinian did declare an adherence to a Christian view of government, and it falls, curiously enough, in the constitution that authorized the *Digest*.

Now things divine are entirely perfect, but the character of human law is always to hasten onward, and there is nothing in it that can abide forever, since nature hastens eager to produce many new forms. We therefore do not cease to expect that matters will henceforth arise that are not secured in legal bonds. Consequently, if any such case arises, let a remedy be sought from the Augustus, since in truth God has set the imperial function over human affairs, so that it should be able, whenever a new contingency arises, to correct and settle it and to subject it to suitable procedures and regulations. We are not the first to say this. It is of ancient descent, since Julian himself, that most acute author of legal writings and of the Perpetual Edict, set it down in his works that if anything defective should be found, the want should be supplied by imperial legislation. Indeed, not he alone, but also the deified Hadrian, in the composition of the Edict and the *senatus consultum* that followed it, laid down in the clearest terms that if anything were found to be not stated in the Edict, later authority could settle this in accordance with its rules and opinions and by closely following these.⁸⁴

Here, oddly enough, at a moment when Justinian explicitly cited a classical precedent, he departed violently from it. For Julian, and Hadrian, too, will have located the power of the emperor to make law in the *lex* that the people passed, transferring to him and into him its power of command and legislative authority.⁸⁵ Justinian recognized no such earthly source of his power: *Deo auctore*.⁸⁶

83 *CJ* 1.17.1.10.

84 *CJ* 1.17.2.18 (translation after G. E. M. de Ste Croix).

85 Cf. Ulpian *Institutes* bk. 1 fr. 1916 (Lenel 1889: 2: 928) = *Dig.* 1.4.1.pr.

86 *CJ* 1.17.1.pr.: *Deo auctore gubernantes imperium, quod nobis a caelesti maiestate traditum est.*

Bibliography

Abbreviations of Journals, Reference works, etc.

<i>AJPh</i>	<i>American Journal of Philology</i>
<i>ANRW</i>	<i>Aufstieg und Niedergang der römischen Welt</i> (Berlin, 1972–)
<i>ASSR</i>	<i>Archives de Sciences Sociales des Religions</i>
<i>BÉFAR</i>	<i>Bibliothèque des Écoles françaises d'Athènes et de Rome</i>
<i>CA</i>	<i>Classical Antiquity</i>
<i>CÉFR</i>	<i>Collections de l'École française de Rome</i> (1976–)
<i>CP</i>	<i>Classical Philology</i>
<i>CQ</i>	<i>Classical Quarterly</i>
<i>Der Neue Pauly</i>	H. Cancik, and H. Schneider, eds. <i>Der Neue Pauly: Enzyklopädie der Antike</i> . (Stuttgart 1996–2003)
<i>JAC</i>	<i>Jahrbuch für Antike und Christentum</i>
<i>JECS</i>	<i>Journal of Early Christian Studies</i>
<i>JRS</i>	<i>Journal of Roman Studies</i>
<i>LCL</i>	Loeb Classical Library
<i>MÉFRA</i>	<i>Mélanges de l'École française de Rome (Antiquité)</i>
<i>PCPhS</i>	<i>Proceedings of the Cambridge Philological Society</i>
<i>RAC</i>	<i>Reallexicon für Antike und Christentum</i> (Stuttgart 1941–)
<i>RE</i>	A. Pauly, G. Wissowa, and W. Kroll. <i>Real-Encyclopädie der klassischen Altertumswissenschaft</i> (1893–1972)
<i>RHD</i>	<i>Revue d'histoire du droit</i>
<i>RGVV</i>	<i>Religiongeschichtliche Versuche und Vorarbeiten</i>
<i>SC</i>	<i>Sources chrétiennes</i>
<i>TAPA</i>	<i>Transactions of the American Philological Association</i>
<i>TR</i>	<i>Tijdschrift voor Rechtsgeschiedenis</i>
<i>ZfR</i>	<i>Zeitschrift für Religionwissenschaft</i>
<i>ZNTW</i>	<i>Zeitschrift für die Neutestamentliche Wissenschaft und die Kunde der älteren Kirche</i>
<i>ZPE</i>	<i>Zeitschrift für Papyrologie und Epigraphik</i>
<i>ZSS (RA)</i>	<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: romanistische Abteilung</i>

Sources

Ambrose	<i>Ep[istles]</i>
Ambrosiaster	<i>L[iber] Q[uaestionum]</i>
Apul[eius]	<i>Apol[ogia]; Met[amorphoses];</i>
Asc[onius]	[Commentary on Cicero,] <i>In Pis[onem];</i> [Commentary on Cicero, <i>Pro</i>] <i>Corn[eleo de maiestate]</i>
Aug[ustine]	<i>De Civ[itas] D[ei]; Ep[istles]; Sermones]</i>
Cato	<i>[de] Agr[icultura]</i>
Catull[us]	
CCL	<i>Corpus Christianorum, Series Latina</i> (Brepols)
Cels[us]	
Cic[ero]	<i>[Epistulae ad] Att[icum]; Brut[us]; [in] Cat[ilinam]; [pro] Cluentia; [de] Divinatione; [de] Dom[o sua]; [Epistulae ad] Fam[iliares]; [de] Har[uspice] resp[onso]; [de] Inventione rhetorica; [de] Leg[ibus]; [de] Leg[e] agr[aria]; [pro] Mur[ena]; [de] Nat[ura] D[eorum]; [de] Officiis]; de Or[atore]; Orat[or ad M. Brutum]; [pro C.] Rab[irius] perd[uctionis reo]; [pro] Rab[irio] Post[umio]; [de] Rep[ublica]; [pro Sexto] Rosc[io] Am[erino];</i>

<i>CIL</i>	<i>Corpus Inscriptorum Latinarum</i> (1863–)
<i>Cod. Iust.</i>	<i>Codex Iustinianus</i>
<i>Cod. Theod</i>	<i>Codex Theodosianus</i>
<i>CSEL</i>	<i>Corpus Scriptorum Ecclesiasticorum Latinarum</i>
<i>Dig.</i>	T. Mommsen and P. Kruger, eds., <i>Digesta Iustiniani Augusti</i> (Berlin, 1870)
<i>EpEph</i>	<i>Ephemeris Epigraphica: CIL Supplementum</i> (Berlin, 1872–1913)
Eusebius	<i>Hist[oria] eccl[esiastica]; Praep[aratio] Evang[elica]; Vita Const[antini]</i>
<i>FIRA</i>	S. Riccobono, <i>Fontes Iuris Romani Antelustiniani</i> (1941)
Halm	K. Halm, <i>Rhetores Latini Minores</i> (1863)
Hor[ace]	<i>Ep[istles]; Sat[irae]</i>
Il.	<i>Iliad</i>
<i>ILS</i>	H. Dessau, <i>Inscriptiones Latinae Selectae</i> (1892–1916)
<i>Inscr. Ital</i>	<i>Inscriptions Italiae</i> (1931/2–)
Jerome	<i>Chron[ica]; Ep[istles]</i>
Josephus	<i>A[ntiquitates] J[udaicae]</i>
Julian[us imperator]	<i>Ep[istles]</i>
Lactant[ius]	<i>De mort[ibus] pers[ecutorum]; Div[inae] Inst[itutiones]</i>
Liv[y]	
Macrobi[us]	<i>[Commentarius ex Cicerone] in Somn[ium] Scipionis; Sat[urnalia]</i>
Nep[os]	<i>Alc[ibiades]</i>
<i>Nov. Theod.</i>	<i>Novellae Theodosianae</i>
Od.	<i>Odyssey</i>
Ov[id]	<i>Am[ores]; Rem[edium] Amoris]</i>
Pers[ius]	
Petr[onius]	<i>Sat[yrica]</i>
Philo	<i>[de] Spec[ialibus] Leg[ibus]</i>
PL	Migne, <i>Patrologia Cursus, series Latina</i>
Plat[o]	<i>Ap[ologia]; Euthphr[o]; Leg[es]; Resp[ublica]</i>
Plin[y] the Elder	<i>N[aturalis] H[istoria]</i>
Plin[y] the Younger	<i>Ep[istles]</i>
Plot[inus]	<i>Enn[eades];</i>
Porphyr	<i>[de] Phil[osophia] ex] Orac[ulis]; Vita Plot[ini]; Vita Pyth[agorae]</i>
Proc[us]	<i>In [Platonis] R[empublicam] commentarii]</i>
PS	Iulius Paulus, <i>Sententiae</i>
Quint[ilian]	<i>Decl[amationes] Mai[ores]; Decl[amationes] Min[ores]; Inst[itutio] Oratoria]</i>
<i>Rhet. Her.</i>	<i>Rhetorica ad Herennium</i>
<i>RIG</i>	Duval, P. -M, ed., <i>Recueil des Inscriptions gauloises</i> 3 (1985)
<i>SC</i>	<i>Sources chrétiennes</i>
Scholl[ia] Bob[icensia]	<i>Ad Cic[eronem][in] Vat[inium]</i>
Sen[eca]	<i>Contr[eversiae]</i>
Sen[eca] the Younger	<i>Ep[istles]</i>
Serv[ius]	<i>Aen[eid]; Geor[gics]</i>
Sozom[on]	<i>Hist[oria] eccl[esiastica]</i>
Suet[onius]	<i>Aug[ustus]; Calig[ula]; Clau[dius]; Tib[erius]; Vit[ellius]</i>
Suet[onius] F[ragmenta]	Reifferscheid, A., ed. <i>Praeter Caesarum libros reliquiae</i> (1860)
Tac[itus]	<i>Ann[ales]</i>
Tert[ullian]	<i>Apol[ogeticus]; De praescr[iptione] haeret[icorum]; [de] Pud[icitia]; [de] Spect[aculis]</i>
Tib[ullus]	
TRF	O. Ribbeck, <i>Tragicorum Romanorum Fragmenta</i> (1962)
Val[erius] Max[imus]	
Varr[o]	<i>Ant[iquitates] Div[inae]; [de] Ling[ua Latina]; [Saturnae] Men[ippae]; [de] re] Rust[ica]</i>
Vell[erius] Pat[erulus]	
Verg[il]	<i>Ecl[ogues]</i>
Xen[ophon]	

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Abstracts

1. John Scheid, 'Oral tradition and written tradition in the formation of sacred law at Rome'

The attempt to reconstruct the contents of a Roman sacred literature fails on two levels: it is based on a misrecognition of the nature of Roman ritualism; and it fails to respect the form and ambitions of Roman elaborations of religious law and laws on religion. Laws on impiety provide an important test case, not least because many scholars have interpreted them as suggesting a softening in some postulated severe archaic piety. But they do no such thing. Read alongside laws on noxal surrender, the laws on impiety reveal two things above all: first, the complete incorporation of the gods within the citizen body and their corresponding subjection to the laws of the community; and second, that the rules on impiety and *editio noxae* both reflect the structures and ideology of the city and should therefore be understood as having developed alongside civic institutions and the conceptualization of law. This has further implications for the study of archaic Roman religion and the textual evidence employed within it.

2. Jörg Rüpke, 'Religion in the lex Ursonensis'

The late Republican *lex Ursonensis*, the statute organizing civic life at the Caesarian colony at Osuna, represents a new stage in Roman religion and law. Earlier attempts to codify public law – the law of rites, priesthoods and magistracies – commenced only a few years earlier, and those inscribed in official texts in particular may well strike a modern reader as incoherent. But in the law of Urso some principles of ordering are detectable, and the text offers the only extensive evidence whatsoever before the Flavian municipal law for the language and reasoning whereby religious concerns were inscribed in the language of statute, at the heart of a community's self-definition. Within its regulations, two distinct spheres of religious activity may be discerned: one public, financed and organized by the colony's council and magistrates, and characterized by large, public rituals; the other is formulated negatively and might be called private, concerned with expiation, burial and ancestor cult. The regulation of priesthoods by magistrates represents a significant departure from practice at Rome.

3. James Rives, 'Magic, religion and law: the case of the Lex Cornelia de sicariis et veneficiis'

Scholars of Roman law and religion have suggested that the term magic operated within religious and legal discourse to designate unacceptable forms of religiosity. They have likewise posited the late Republican 'Cornelian law on murderers and poisoners' as the principal statute whose elaboration provided the basis for policing actions against deviant forms of religion throughout much of the subsequent history of Roman law. But in so reading the *lex Cornelia*, scholars have been unduly influenced by the wording of its most extensive witness, the late third-century Opinions of Paulus, and so have come to assume what needed in fact to be proved, namely, that what the *lex Cornelia* criminalized was conceived from the start as a particular type of magic, and that for this reason it came quickly and readily to apply to other types of 'magic' as well. Careful consideration of the cases to which the *lex* was held to apply reveals strong conservatism in application of the law as regards intent, but a fairly rapid expansion of means, to embrace verbal formulae and prayers, as well as poisons. The eventual subsumption of religious deviance under the *lex Cornelia* followed on this development. The evidence for trials on charges of magic urges a kindred skepticism; it is by no means as obvious as it is often assumed that such trials were conducted under the *lex Cornelia*. In fact, extra-ordinary hearings before magistrates seem much the likelier context for such trials, and the Opinions of Paulus a maverick and idiosyncratic solution to a typical problem at law, namely, that of classification. The landscape of religion and law under the empire appears more variegated and provisional as a result.

4. *Elizabeth Digeſer, «Religion, law and the Roman polity: the era of the Greak Persecution»*

The abundant literatures – philosophical, religious, and legal – produced during the Great Persecution and its aftermath offer a remarkable opportunity to study the reasoning and actions of pagan and Christian emperors of the ſame generation, as they ſought to reify their belief that religion lay at the heart of public law and provided the foundation for the Roman ſtate. It is perhaps not ſurprising that a pagan Roman emperor like Galerius ſhould deſcribe his ambition as that of reſtoring ſome harmony between «the ancient laws and public diſcipline of the Romans,» nor that he ſhould accuſe the Chriſtians of «having abandoned the way of life of their anceſtors.» But he went further ſtill, and did ſo under the influence of conceptualizations of the relationship between religion and ſtate advanced by Neoplatoniſt philoſophers, Porphyry moſt prominent among them. The connection thus drawn between religion, public order and public law found an eager audience even among Chriſtian polemicists during the Great Persecution, as among Chriſtian legiſlators in the years that followed.

5. *Andrew Jacobs, ««Papinian commands one thing, our Paul another»: Roman Chriſtians and Jewish Law in the Collatio Legum Moſaicarum et Romanarum»*

Roman Chriſtian identity in the high and late empire poſſeſſed a double logic. On the one hand, Chriſtians ſhared with their pagan counterparts a ſplit identification with, and alienation from, the empire, as both benevolent diſpenſer and ruthleſſ imposer of laws. And on the other, they alſo poſſeſſed their own legacy, by which they ſought at once to diſtinguiſh an independent and transcendent ſource for Chriſtian law and identity, and alſo to ſituate themſelves as Romans and ſubjects of Roman law. The fourth-century «Comparison of Moſaic and Roman law» represents a ſignal intervention in this milieu. Locating the ſource of Chriſtian law in the Pentateuch, it ſits alſoſide other Chriſtian attempts to conſtruct themſelves through the paired geſtures of rejeſting and appropriating Judaism and the Holy Land. At the ſame time, in both aſſeſſing and eſteeming Roman law, the Collatio manipulates the authority and antiquity of biblical law in a double geſture of triumph over Rome and triumph as Rome.

6. *Dorothea Baudy, «Prohibitions of religion in antiquity: ſetting the courſe of Europe’s religious history»*

Legal actions againſt religions took many forms under the Roman Empire. Then, as in moſt pre-modern ſtates, the explicit prohibition of religions as ſuch, rather than of particular practices, was rare. And yet, the history of the empire alſo encompassed one transition of world-historical importance, one ſhepherded, promoted and ultimately enforced through legiſlation: the termination of pagan cults and the impoſition of Chriſtianity as the religion of all citizens of the empire. Careful examination of earlier legiſlation againſt ſpecific religions and religious practices yields little precedent for Chriſtian law-making of the late fourth-century, unleſſ it is the gradual clustering of a group of practices and prieſthoods under the rubric of divination and diviners between 294 and 357 CE. Legiſlation continued to focus on observable acts; though internal diſpoſition was an object of concern to eccleſiaſtical authorities, it did not become the object of legiſlation. The overall historical proceſs by which the government moved againſt paganiſm advanced conſiderably the authoritarian ambitions of late ancient government.

7. *Karl Leo Noethlichs, «Revolution from the top? «Orthodoxy» and the perſecution of heretics in imperial legiſlation from Conſtantine to Juſtinian»*

Literary teſtimonia for the perſecution of Chriſtians between the fourth and ninth centuries attribute thoſe actions overwhelmingly to two parties, to barbarians outside (and occaſionally inside) the empire, and to emperors. Indeed, the emperor is named as agent in ſome ſeventy percent of atteſted perſecutions in this period. And among evidence for the role of the government in perſecuting Chriſtians, ſtatutes loom large: one hundred and four ſeperate edicts impoſe ſanctions on erroneous believers. The cooptation of the mechanisms of government for religious perſecution offers more than an index of the ſea-change in Chriſtianity’s political fortunes. It alſo conſtrained the modes of argument and range of actions available to biſhops and theologians in the conſtruction and deſe of orthodoxy.

8. *Clifford Ando, «Religion and ius publicum»*

The law codes of the late empire are often deſcribed as Chriſtian codifications, that of Juſtinian being the more ſo in ſo far as laws on religion occupy the firſt book of his Code and the laſt in that of Theodoſius. But the paſſage into both Codes of language and ſtructures inherited from claſſical jurisprudence makes it difficult to aſſeſſ wherein Chriſtian ſocial theory as reified through law differed from pagan conceptions of religion and ſocial orders. One mechanism by which to make that aſſeſſment might be diſcovered by inquiring into the confidence of the Severan jurists, whoſe elegant formulations of the nature of public law ſo influenced legal theorists in Chriſtian Conſtantinople. Late Republican writings on law and religion diſplay a concern to aſſeſſ the achievements of any given code of law againſt other bodies of civil law on the one hand, and againſt (unwritten) transcendent ſtandards of juſtice or natural or divine law on the other. This concern ſeems to reſt upon a preconception about the ontological ſtatus of bodies of law qua ſystems of knowledge deeply conſonant with the epiſtemic baſis of claſſical Roman paganiſm. Tracing the paſſage of theſe concerns acroſſ ſix hundred years of legal ſocial theory provides one index by which to meaſure the transformations of ſociety and government in the later Roman empire.

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